(1)

88-178

No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI,
Petitioner,

vs.

KENNETH PRESLEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS

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QUESTION PRESENTED

Whether a court reviewing a defendant's Sixth Amendment claim that he was denied effective assistance of counsel may presume the defendant suffered actual prejudice simply because the defendant's trial counsel failed to challenge a juror for cause.

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The Opinion of the Missouri Court of Appeals, Southern District, *en banc,* affirming the grant of post-conviction relief (App. A4), is as yet unreported. The Opinion of the Missouri Court of Appeals, Southern District, affirming respondent's conviction on direct appeal is included in the Appendix to this petition (App. A56).

Respondent Kenneth Presley originally filed his motion for post-conviction relief under Missouri Supreme Court Rule 27.26 (repeal effective January 1, 1988) on October 23, 1985, in the Circuit Court of Greene County, Missouri. Presley then filed an amended Rule 27.26 motion on March 5, 1986 (App. A48). On April 16, 1987, the Circuit Court, Donald Bonacker, J., issued its Memorandum and Order granting respondent's Rule 27.26 motion (App. A37). The Missouri Court of Appeals affirmed the trial court's judgment on April 15, 1988 (App. A4). Petitioner, the State of Missouri, then filed a motion for rehearing and an application to transfer in the Court of Appeals. The Court of Appeals denied petitioner's motion on May 2, 1988 (App. A3). Petitioner then filed a motion to transfer in the Missouri Supreme Court, which motion was denied on June 15, 1988 (App. A1).

JURISDICTION

The Missouri Court of Appeals' order denying petitioner's motion for rehearing and application for transfer was issued on May 2, 1988. Pursuant to 28 U.S.C. §2101 (c) and Supreme Court Rules 17 and 20, the present petition for a writ of certiorari was required to be filed within ninety days of the Court of Appeals' order. Jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS CITED

1. The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

After trial before a jury in the Circuit Court of Greene County, Missouri, Respondent Kenneth Presley was convicted of one count of first-degree sexual abuse, a violation of §566.100, RSMo 1986; one count of second-degree sexual abuse, a violation of §566.110, RSMo 1986; one count of abuse of a child, a violation of §568.060, RSMo 1986; and four counts of rape, in violation of §566.030, RSMo 1986. Those convictions were affirmed on direct appeal. *State v. Presley*, 694 S.W.2d 867 (Mo.App., S.D. 1985) (App. A56). Presley filed a motion to vacate sentence under Missouri Supreme Court Rule 27.26, alleging claims entitling him to relief. Presley's motion was granted by the Circuit Court of Greene County. It is from the grant of Presley's motion to vacate his sentences that the Petitioner, the State of Missouri, asks this Court to grant its writ of certiorari to the Missouri Court of Appeals.

Presley received relief based on the claim that he was denied his Sixth Amendment right to effective assistance of counsel at his trial in that his counsel failed to challenge for cause a particular venireman, Francis Cates, who, following voir dire examination, sat as a member of the jury. In order for the Court to fully appreciate the State's argument, the State will set forth the facts in this case.

Respondent Presley was originally tried in the Circuit Court of Greene County, Missouri, Max Bacon, J., presiding. At voir dire, after seating the venire, the court briefly summarized the nature of the case and posed a question to the venire as follows:

> THE COURT: Now, is [sic] there any of you that because of the nature of the case [,] feel that you couldn't be fair and impartial?
>
> (No one responds).

[App. at A69.] Later in voir dire, Presley's trial counsel posed the following question:

> Is there anyone else who perhaps feels the same way that they could not give my client a fair trial because of the nature of the charges against him?
>
> (No one responds).
>
> MR. SEIGEL: I take it by your silence everyone else, then, could give him a fair trial.

[App. at A69.] A moment later, Stephen Seigel asked the venire if any of them had been victims of a crime. The following colloquy took place:

> MR. SEIGEL: Thank you. Mr. Cates?

JUROR CATES: Yes, I've been burglarized at my home about seven years ago. We recovered the articles.

The businesses have been broken into several times and one armed robbery.

And, my daughter was exposed by an exhibitionist about three years ago that we reported.

MR. SEIGEL: Were you in your place of business when you had the armed robbery?

JUROR CATES: No.

MR. SEIGEL: Was it in the place of business?

JUROR CATES: Yes.

MR. SEIGEL: Anything about that or the burglary of seven years ago or your daughter's incident which would make you unable to sit in judgment fairly on my client, fairly today?

JUROR CATES: I don't, yes, I think I'd be a little partial to your client, or against your client.

MR. SEIGEL: You'd be partial to the state?

JUROR CATES: Right.

[App. at A69-A70.]

At the conclusion of voir dire, Seigel made three challenges for cause, two of which were sustained, and one, against Venireman Bruce Fetter, was denied (App. A7). Neither party challenged Venireman Cates (App. A7). At Presley's Rule 27.26 motion hearing, counsel for the parties stipulated that the jury list used by the trial judge at the jury trial bore the comment "partial to state" op-

posite the name of Venireman Cates and that the comment was written by the trial judge during the voir dire examination (App. A7).

Also at Presley's Rule 27.26 motion hearing, Stephen Seigel testified. He testified that he remembered Venireman Cates from voir dire. Asked why he had not challenged Cates for cause, Seigel stated (App. A7):

> I looked at my notes today[,] and it's my impression that I remember him [sic] saying he was saying he was not impartial . . . I realize that in the transcript[,] Cates said he could not be impartial. My notes and my recollection of what Cates said were different from what the transcript says . . . I did say in my notes that certain veniremen were prejudiced, but I had no such notation by Cates' name . . . The reason I did not ask for [Cates] to be stricken was I believed at that time he was impartial.

The Rule 27.26 motion judge, in his Findings of Fact following the hearing, specifically found that Seigel wrote "prejudiced in favor of state" next to the name of another juror, and thus, Seigel attributed the statement of Juror Cates—that he would be a "little partial"—to another juror in his notes by mistake. The Rule 27.26 motion court also found the trial judge did not correct Seigel's misidentification of the juror making the response that he would be "a little partial . . . ." *See*, App. A9.

As the Court of Appeals in its opinion noted, it can at least be inferred that Seigel noted Cates' response on his juror list, but noted that response next to the name of Venireman Fetter. *See*, App. A9-A10. Seigel then attempted to strike Fetter—presumably, for the reason for which he would have attempted to strike Cates had

he noted Cates' response correctly next to Cates' name (App. A10). In its opinion, the Court of Appeals found that Presley's trial counsel was ineffective for failing to challenge Venireman Cates for cause (App. at A15).

From the Missouri Court of Appeals' *en banc* opinion, the petitioner, State of Missouri, files the instant petition in this Court.

ARGUMENT

This petition presents a vital question of federal constitutional law. As this Court is undoubtedly aware, its ruling in the case of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), has had enormous impact on the criminal justice system in this nation. When a court such as the Missouri Court of Appeals in this case interprets the *Strickland v. Washington* standard wrongly, the effect of that wrong interpretation is made all the more devastating by the importance of the *Strickland v. Washington* standard to the criminal appeals process. Thus, the issue before the Court is a grave one.

Beyond the gravity of the issue presented, as this Court will see, there is a deep conflict between the rule adopted by the Missouri Court of Appeals in this case and the rulings of other state and federal courts in similar situations. As the petitioner State will demonstrate, at least eleven other state courts of appeal, as well as two federal courts of appeal, have held contrary to the rule adopted by the Missouri Court of Appeals. Given that conflict and the importance of the issue raised in this petition, this Court should intervene by its grant

of certiorari and resolve this question. Supreme Court Rule 17.

The Missouri Court of Appeals, *en banc*, affirmed the ruling of the circuit court granting Respondent Presley's motion to vacate his sentence under Missouri Supreme Court Rule 27.26. In its decision, the Court of Appeals held that Presley was denied his right to effective assistance of counsel under the Sixth Amendment when his trial counsel failed to challenge for cause a venireman who indicated he would be "a little partial" to the State at trial.

The Missouri Court of Appeals quoted the rule in *Strickland v. Washington, supra,* in coming to its conclusion. The Court of Appeals observed that in *Strickland, supra,* this Court stated that:

> the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. . . . A convicted defendant's claim that counsel's assistance was so defective so as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both

> showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Presley v. State, slip op. at 7-8 (App. A10-A11), *quoting, Strickland, supra,* 466 U.S. at 687. Although it did not expressly hold that respondent's trial counsel acted unreasonably in failing to challenge Venireman Francis Cates for cause, the Court of Appeals affirmed the specific finding of the circuit court that Presley's trial counsel's failure to challenge Cates for cause was unreasonable under the *Strickland* standard.[1]

The Court of Appeals then went on to presume that Presley was prejudiced by his trial counsel's failure to challenge Cates for cause. In coming to its conclusion, the Court of Appeals relied on the language in *Strickland, supra,* in which this Court stated: "In certain Sixth Amendment contexts, prejudice is presumed . . . ." *Strickland, supra,* 466 U.S. at 692. The Court of Appeals held that Presley's trial counsel's action in failing to challenge for cause a juror who indicated that he would be "a little partial" to the state at trial was the kind of action which was presumed prejudicial to Presley. Without ruling as to actual prejudice, the court stated that "there was here a denial of the right to trial by jury. This fits the *Strickland* language, at 104 S.Ct. 2067, that 'prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.'" *Presley,*

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1. As petitioner set forth in its Statement of the Case, *see, supra* at 2, the trial court found that the reason Presley's trial attorney failed to challenge Cates for cause was that trial counsel made a notation on his juror list of Cates' response, he would be "a little partial" to the state, but that trial counsel had made that notation next to another juror's name, not next to the name of Cates. *See,* App. A9-A10.

supra, slip op. at 12 (App. A15). The Court of Appeals thus held the *Strickland* standard was satisfied through presumptive prejudice and that Presley was entitled to relief on his claim of ineffective assistance of counsel.

Clearly, as the State will show, the Missouri Court of Appeals thoroughly misunderstood this Court's ruling in *Strickland v. Washington, supra,* when it applied the rule in *Strickland* to the case at bar. This Court should find that this case is not a case in which prejudice should be presumed from the defendant's showing of his trial counsel's breach of duty. Moreover, this Court should see that were the wrongly applied presumption of prejudice removed in this case, it is clear Presley could not have prevailed on his post-conviction motion because Presley has failed to demonstrate prejudice as required under the *Strickland* standard.

A brief glance at *Strickland, supra,* will illuminate the State's argument in this case.

As this Court noted in *Strickland, supra,* "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." 466 U.S. at 691. The Court stated that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the [Sixth Amendment to the] Constitution." 466 U.S. at 691-692. This Court then held the reviewing court, in assessing the prejudice from trial counsel's errors, must inquire as to "whether there is a reasonable probability, absent the errors, [that] the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695. This Court instructed that "in making this determination,

a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.*

To be sure, this Court, in *Strickland,* did indicate that there were certain situations in which "prejudice," under the Sixth Amendment standard, is presumed. *See, Strickland, supra,* 466 U.S. at 692. In the first instance, the Court stated that "actual or constructive denial of the assistance of counsel altogether" is presumed prejudicial to the defendant." *Id.* The Court in *Strickland* also stated that "various kinds of state interference with counsel's assistance" would be sufficiently serious to dispense with a detailed inquiry into prejudice.[2]

This Court, in *Strickland,* thus listed only three categories of ineffective assistance of counsel in which prejudice is presumed. The Court identified a fourth situation in which a "similar, though more limited, presumption of prejudice" should apply. *See, Strickland, supra,* 466 U.S. at 692. The Court held that prejudice is presumed when counsel is burdened by "an actual conflict of interest." *Id.* The Court went on to explain that even in that situation, the defendant must demonstrate that counsel actively represented conflicting interests and that the actual conflict of interest adversely affected the lawyer's performance. *Strickland, supra,* 466 U.S. at 692.

In sum, then, the Court in *Strickland* carefully set forth four categories of ineffective assistance of counsel

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2. In explaining what it meant by "various kinds of state interference with counsel's assistance," the Court directed attention to its opinion in *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In *Cronic,* 466 U.S. at 659, n. 26, the court noted: "[It] has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."

in which prejudice is to be presumed to some extent. Unfortunately, the instant case does not present a situation which fits any of those four categories. There was no actual or constructive denial of the assistance of counsel in the instant case. Nor was there in this case any record of "state interference with counsel's assistance." Finally, Presley's trial counsel was not burdened by an actual conflict of interest.

Clearly then, the situation in the instant case was not the kind of case to which this Court granted reviewing courts license to presume prejudice. Nonetheless, the Missouri Court of Appeals presumed the error was prejudicial. In explaining its action, the Court of Appeals characterized the failure to exclude Venireman Cates as equivalent to "a denial of the right to trial by jury." *Presley, slip op.* at 12 (App. A15). The Court of Appeals explained its assertion as follows:

> The instant record shows that the jury contained one juror who was, by his own admission, biased. That was tantamount to a denial of the right to trial by jury. It is no answer to say that the other eleven jurors were free of bias and all of them agreed upon a verdict of guilty . . . The instant situation, this Court holds, is an example of the type the Court envisioned by the language in *Strickland*: "In certain Sixth Amendment contexts, prejudice is presumed."

Presley, supra, slip op. at 12 (App. A15). The Court of Appeals thus seems to indicate that when a defendant claims ineffective assistance of counsel for failure to challenge the seating of a biased juror, the reviewing court can safely dispense with the inquiry into prejudice mandated by *Strickland*.

This Court should be alarmed by the Court of Appeals' conclusion for two independent reasons. First, the Court of Appeals' assertion is that a reviewing court need not inquire into prejudice under the *Strickland* standard when the question is one of counsel's failure to challenge a biased juror. The Court of Appeals' opinion is manifestly against the great weight of authority in state and federal courts which have utilized the *Strickland* standard. Other state and federal courts, when evaluating a claim of ineffective assistance of counsel involving a failure to challenge a biased juror, have inquired into whether prejudice resulted without presuming that prejudice was present. *See, United States v. Taylor,* 832 F.2d 1187 (10th Cir. 1987); *Edgemon v. Lockhart,* 768 F.2d 252, 254-255 (8th Cir. 1985), *cert. denied,* ..... U.S. ....., 106 S.Ct. 1468 1986); *Mason v. State,* 289 Ark. 299, 712 S.W.2d 275, 276 (Ark. 1986); *Trenor v. State,* 252 Ga. 264, 313 S.E.2d 482, 485-486 (Ga. 1984); *People v. Collins,* 106 Ill.2d 237, 87 Ill.Dec. 910, 478 N.E.2d 267, 282-283 (Ill.), *cert. denied,* 474 U.S. 1027, 106 S.Ct. 585, 88 L.Ed.2d 274 (1985); *Turner v. State,* 508 N.E. 2d 541, 548 (Ind. 1987); *State v. Nebinger,* 412 N.W.2d 180, 193-194 (Iowa Ct.App. 1987); *People v. Robinson,* 154 Mich.App. 92, 397 N.W.2d 229, 231 (Mich.Ct.App. 1986); *State v. Prudden,* 212 N.J.Super. 608, 515 A.2d 1260, 1266 (N.J.Super.Ct.App.Div. 1986); *State v. Price,* 104 N.M. 703, 726 P.2d 857, 863 (N.M.Ct.App. 1986); *Perkins v. State,* 695 P.2d 1364, 1368 (Okla.Crim.App. 1985); *Commonwealth v. Mancini,* 340 Pa.Super. 492, 490 A.2d 1377, 1388 (Pa.Super. Ct. 1985); *Parker v. State,* 693 S.W.2d 640, 643 (Tex.Crim. App. 1985).[3] Thus, the Missouri Court of Appeals places

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3. The Court of Appeals, in its opinion, *Presley, supra, slip op.* at 10-12 (App. A12-A15), acknowledged that no other state had held prejudice to be presumed in a situation of ineffective

(Continued on following page)

itself in conflict with the great, if not unanimous, number of state and federal courts which have decided this issue. This Court should resolve this conflict by its grant of certiorari.

Moreover, this Court should be troubled by the policy implications of the Missouri Court of Appeals' ruling. When boiled to its essence, the Court of Appeals' opinion stands for the proposition that any ineffective-assistance-of-counsel claim which amounts to a "denial of the right to trial by jury" is entitled to the presumption of prejudice per *Strickland*. The rule advanced by the Court of Appeals has broad implications beyond the parameters of the case at bar. Any claim of ineffective assistance of counsel which touches on the jury selection process, as well as any instance of erroneous jury instruction challenged via the *Strickland* standard, can be read to effectuate a denial of the right to trial by jury. Surely, this Court can perceive the danger of the advancing host of claims which can be projected as presumptively prejudicial under the *Strickland* standard simply because those claims involve some aspect of the right to trial by jury. At the very least, the Court of Appeals' opinion can be fairly read to presume prejudice under the *Strickland* standard in any case in which counsel commits some error in the voir dire

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Footnote continued—

assistance of counsel based on failure to challenge a juror. Even in a case cited by the Court of Appeals (App. A13), *Gordon v. State*, 469 So.2d 795, 797 (Fla.Ct.App. 1985), the Florida Court of Appeals did not apply a *per se* rule of prejudice, but instead, inquired into the presence of actual prejudice and the weight of the evidence against the defendant. *Gordon, supra*, 469 So.2d at 797-798. The Missouri Court of Appeals simply could not find any support in *Gordon* or in the other cases for the proposition that, in the case of ineffective assistance of counsel for failure to correct juror bias, the presence of prejudice should be presumed.

process. In that fashion, a situation of presumptive prejudice completely unenvisioned by *Strickland* opens wide a breach in the wall of Sixth Amendment jurisprudence through which may flow all manner of successful claims of ineffective assistance of counsel. This Court can easily appreciate the flood of claims which will result, which claims have a relatively small quantum of arguable merit but which claims have the advantage of the presumption of prejudice. This Court correctly placed the burden on the defendant to show prejudice from counsel's errors under the *Strickland* standard. Likewise, the Court fashioned exceptions to that rule and allowed the presumption of prejudice to exist in certain tightly drawn situations. This Court should close the breach opened by the Missouri Court of Appeals' opinion and return the focus of Sixth Amendment jurisprudence to actual prejudice.[4]

As this Court should be keenly aware, the policy reasons, as well as the juridical reasons, for this Court to resolve this conflict by its writ of certiorari is unmistakable. This Court should notice its resolution of this issue,

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4. Of course, were this Court to allow the Court of Appeals' decision to stand, the presumption of prejudice would prevail in a significant number of situations outside the tightly drawn parameters of *Strickland*. In those specific cases in which prejudice would be presumed under the Court of Appeals' rule, the focus would then be on the first prong of the *Strickland* standard, the question of the reasonableness of counsel's act or omission. Such a change in the focus of Sixth Amendment jurisprudence would drain the vitality from this Court's declaration in *Strickland* that "the object of an ineffectiveness claim is not to grade counsel's performance." If the Court of Appeals' logic prevails, in a significant number of situations, the whole focus of the inquiry would be on counsel's performance since prejudice would be presumed. Defense counsel, burdened by the weight the Court of Appeals' opinion seems to place on their decisions—especially in voir dire—may well become paralyzed with overcaution, with the result being that "the entire criminal justice system suffers as a result." *Strickland, supra,* 466 U.S. at 697.

by its reversal of the judgment of the Court of Appeals, would have a practical effect as well. Certainly, if the Court of Appeals were to have evaluated Presley's claim for actual prejudice, rather than presuming prejudice, the Court of Appeals would have found Presley did not suffer actual prejudice as set forth in *Strickland*, and therefore, Presley was not entitled to relief.

There are at least two bases to support the principle that Presley did not suffer prejudice in this case. In the first place, despite the Court of Appeals' assumption to the contrary, Venireman Cates' responses on voir dire indicated only a tendency toward bias, not the sort of overarching bias attributed to Cates by the Court of Appeals in its opinion. As this Court will discover from its reading of the transcript excerpts in the Appendix to this petition, at least twice before the challenged colloquy between Cates and defense counsel took place, the venire panel was asked, considering the nature of the case, whether any member of the panel could not be fair and impartial. On both occasions, no one responded. *See*, App. at A69. As Judge Maus's dissent from the Court of Appeals' opinion emphasizes, after the jury was selected, each juror was instructed as follows: "Faithful performance by you of your duties as jurors is vital to the administration of justice. You should perform your duties without prejudice or fear, and solely from a fair and impartial consideration of the whole case." MAI-CR2d 2.01. *See, Presley, slip op.* at dissent of Maus, J., at 2 (App. A20). Judge Maus looked at the conduct of Venireman Cates during the entirety of voir dire and concluded, "under these circumstances, I do not believe the presence on the jury of one member who said he'd 'be a little partial' against the movant [Presley] to be tantamount to the total denial of the right to trial

by jury." *Id.* This Court, then, could well find that Cates did not sufficiently indicate he would be biased to significantly undermine confidence in the jury's verdict. *See, Strickland, supra,* 466 U.S. at 695-696. Thus, this Court could well hold that even if Cates were included on the jury, that Presley was not prejudiced.

Secondly, this Court should find that Presley suffered no prejudice because the evidence against him was sufficiently strong such that he would likely have been convicted regardless of the presence of Venireman Cates. In making the determination that Presley did not suffer prejudice, this Court should follow its prescription in *Strickland* and "consider the totality of the evidence before the judge or jury." 466 U.S. at 695.

When this Court considers the totality of the evidence against Presley at trial, the Court should begin with the observation of the dissent in the Court of Appeals' case in which Judge Maus states: "It is sufficient to observe the evidence of [Presley's] guilt is overwhelming." *Presley, slip op.* at dissent of Maus, J., at 7 (App. A26). On direct appeal of Presley's conviction, *see,* App. at A56, the Missouri Court of Appeals noted that the two victims of Presley's crimes, his 12-year-old stepdaughter and his 9-year-old daughter, testified at his trial. Both victims testified as to sexual assaults made upon them by Presley and his 14-year-old stepson. *See, State v. Presley,* 694 S.W.2d 867, 869-870 (Mo.App., S.D. 1985) (App. A56). In Presley's post-conviction proceedings, he never challenged the weight of the evidence against him. The clear impression left by the weight of that evidence is that the jury would not have had a reasonable doubt respecting Presley's guilt with or without the presence of Juror Cates, and therefore, Pres-

ley suffered no prejudice under the *Strickland* standard. *See, Strickland,* 466 U.S. at 695.

Upon its grant of certiorari, this Court should reverse the judgment of the Court of Appeals for the simple reason Kenneth Presley did not suffer prejudice by his counsel's failure to strike Venireman Cates for cause.

CONCLUSION

Petitioner respectfully requests that this petition for a writ of certiorari be granted and that the Missouri Court of Appeals' judgment be reversed.

Respectfully submitted,

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APPENDIX

No. 70515
S.D. # 15177 & 15188

IN THE SUPREME COURT OF MISSOURI
May Session 1988

Kenneth Presley,
Movant-respondent,

vs. TRANSFER

State of Missouri,
Appellant,

Kenneth Presley,
Movant-appellant,

vs.

State of Missouri,
Respondent.

Now at this day, on consideration of Appellant State of Missouri's Application to transfer the above entitled cause from the Southern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1988, and on the 14th day of June 1988, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 14th day of June 1988.

/s/ Thomas F. Simon
Clerk.
/s/ Kathleen Blanton,
D.C.

MISSOURI COURT OF APPEALS
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May 2, 1988

Mr. John M. Morris
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In re: Kenneth Presley v. State of Missouri
Case No. 15177 & 15188 (Consolidated)

Dear Mr. Morris:

Today the Court issued the following order:

"Now on this day, the Court, having fully considered respondent's motion for rehearing or to transfer this cause to the Supreme Court of Missouri, does overrule said motion for rehearing and does deny said application for transfer."

Yours very truly,

William C. Cockrill, Clerk

cs

cc: Mr. Ronald Conway

(Filed April 15, 1988)

IN THE MISSOURI COURT OF APPEALS
Southern District
en banc

No. 15177

KENNETH PRESLEY,
Movant-Respondent,

vs.

STATE OF MISSOURI,
Appellant.

No. 15188

KENNETH PRESLEY,
Movant-Appellant,

vs.

STATE OF MISSOURI,
Respondent.

Appeal From the Circuit Court of Greene County
Honorable Donald Bonacker, Judge

AFFIRMED; CROSS-APPEAL DISMISSED

Movant Kenneth Presley and the State of Missouri filed separate appeals from the trial court's order, entered after evidentiary hearing, sustaining with respect to one ground, but overruling with respect to the other

grounds, movant's Rule 27.26[1] motion to set aside a judgment and sentences for seven sexual offenses. The convictions were based on a jury verdict returned after defendant was tried on a multi-count information. This court affirmed the convictions, State v. Presley, 694 S.W. 2d 867 (Mo.App. 1985). The two appeals have been consolidated in this court and the appeal of the state, taken pursuant to § 512.020 (see Rule 27.26(j)), will be considered first.

The trial court's order vacated the judgment containing the convictions and granted movant a new trial on all counts of the information. The ground on which the trial court based its order was that movant was denied effective assistance of counsel at the jury trial in that his counsel failed to challenge for cause venireman Francis Cates who, following voir dire examination, sat as a member of the jury. The state's appeal challenges the trial court's ruling with respect to that ground.

It is the position of the state that the trial court erred in granting movant relief because: (a) even if counsel's failure to challenge for cause venireman Cates was a mistake, the record fails to demonstrate prejudice, and a showing of prejudice is required by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2066[15], 80

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1. Except where otherwise indicated, all references to rules are to Missouri Rules of Court, V.A.M.R., and all references to statutes are to RSMo 1986, V.A.M.S.

Rule 27.26 was repealed, effective January 1, 1988, by order of the Supreme Court of Missouri, see 721-722 S.W.2d (Missouri Cases) XXV, and new rules were adopted in lieu thereof.

On the instant appeals, post-conviction relief continues to be governed by the provisions of Rule 27.26, because the sentences were pronounced prior to January 1, 1988, and movant's motion under Rule 27.26 was then pending. See Rule 29.15(m), effective January 1, 1988, 721-722 S.W.2d (Missouri Cases) XXV, XXXI.

L.Ed.2d 674 (1984); and (b) the ground on which the trial court granted relief, improper jury selection, may not be considered in this Rule 27.26 proceeding because movant waived it by not raising it on his direct appeal from the jury trial.

The material events took place during the voir dire examination segment of the jury trial. In response to defense counsel's inquiry, "Anyone else ever been a victim of a crime?", venireman Cates replied that "seven years ago" his home was burglarized, "the businesses have been broken into several times and one armed robbery, and my daughter was exposed by an exhibitionist about three years ago that we reported." The following colloquy then took place:

> "DEFENSE COUNSEL: Were you in your place of business when you had the armed robbery?
>
> VENIREMAN CATES: No.
>
> DEFENSE COUNSEL: Was it in the place of business?
>
> VENIREMAN CATES: Yes.
>
> DEFENSE COUNSEL: Anything about that or the burglary of seven years ago or your daughter's incident which would make you unable to sit in judgment fairly on my client, fairly today?
>
> VENIREMAN CATES: I don't, yes, I think I'd be a little partial to your client, or against your client.
>
> DEFENSE COUNSEL: You'd be partial to the state?
>
> VENIREMAN CATES: Right."

At the conclusion of the voir dire examination defense counsel made three challenges for cause, two of which were sustained and one, against venireman Fetter, was denied. None of those challenges involved venireman Cates.

At the motion hearing, counsel for both sides stipulated that the jury list, used by the trial judge at the jury trial, bore the comment "partial to state" opposite the name of venireman Cates, and that the comment was written by the trial judge during the voir dire examination.

At the motion hearing, under questioning by counsel for the state, movant testified as follows:

Q. Did you hear your attorney call for the strikes?

A. Yes.

Q. Did you object?

A. I objected to him striking Mr. Fetter instead of Mr. Cates.

Q. Did you tell him that in court?

A. Yes, I did.

Q. In open court?

A. Yes, I did.

Q. Did you tell the court that you objected to that?

A. No, he advised me to keep quiet, he was my attorney.

At the motion hearing, the state called the attorney who had represented movant at the jury trial. He tes-

tified that he remembered venireman Cates and that he had made notes while conducting his voir dire examination. Asked why he had not challenged Cates for cause, the attorney stated, "I looked at my notes today and it's my impression that I remember him saying he was not impartial. . . . I realize that in the transcript Cates said he could not be impartial. My notes and my recollection of what Cates said were different from what the transcript says. . . . I did say in my notes that certain veniremen were prejudiced, but I had no such notation by Cates' name. . . . I don't recall whether [movant] made objections to me at the time of voir dire on my failure to strike Cates. . . . When I read the transcript [of voir dire examination] last night and this morning, the transcript is different from what my recollection was. The reason I did not ask for [Cates] to be stricken was I believed at that time he was impartial."

The transcript of the voir dire examination mentioned by defense counsel was only a partial one when he testified at the motion hearing. Thereafter, Judge Donald Bonacker, who presided at the motion hearing after movant had disqualified the judge who had presided at the jury trial, obtained a complete transcript of the voir dire examination. The complete transcript, admitted into evidence in the motion proceeding by agreement of the parties, contained nothing which would serve to rehabilitate venireman Cates from the partiality which he had candidly expressed.

Judge Bonacker's findings of fact included the following:

> "8. The members of the jury panel, or Juror Cates in particular, were not asked at any stage of

the voir dire examination whether they believed they could be or would be fair and impartial if selected as a member of the jury.

9. Juror Cates, frankly, intelligently, clearly and honestly answered all questions placed to him during voir dire examination and revealed he was partial to the state.

10. Defense counsel failed to request the removal of Juror Cates from the jury panel for cause.

11. Defense counsel was the sole counsel for Movant at the trial and the Court does believe that his duties in maintaining notes, mental and written, during his voir dire examination of the jury caused him to move to strike another juror from the panel for cause believing he was moving to strike the juror who answered as indicated above. The motion to strike another juror for a reason that could have been assigned to Juror Cates was denied.

12. This Court firmly believes the trial judge would have sustained a motion to strike Juror Cates, if the motion had been made.

13. . . . [T]rial counsel wrote in his notes 'prejudiced in favor of State' next to the name of another juror and this court believes [defense] counsel attributed the statement of Juror Cates to another juror in his notes, by mistake. The trial judge did not correct defense counsel's identification of the juror making that response."

In this court the brief of the attorney general, representing the state on this appeal, states: "[T]here is little question that the defense attorney, based upon his

notes taken during the voir dire examination, challenged venireman Fetter for the actual reason that would have supported a strike of venireman Cates." The state's brief also states that venireman Cates' comments "would certainly have provided support for a request to strike him for cause" and that "the record reveals a sad failure on the part of defense counsel, the prosecution, and the trial court, to further pursue this matter."

Appellate review in this proceeding is limited to a determination of whether the findings, conclusions, and judgment of the trial court are clearly erroneous. Rule 27.26(j); Futrell v. State, 667 S.W.2d 404, 405 (Mo. banc 1984). For the reasons which follow, this court holds that the judgment of the trial court granting relief on the ground under consideration is not clearly erroneous.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court said at 104 S.Ct. 2064:

> "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
>
> . . .
>
> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must

show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

At p. 2067 the Court said:

"In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046-2047, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.

. . .

Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice."

At p. 2069 the court said:

"Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness

> of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."

"A criminal defendant in a state court is guaranteed an 'impartial jury' by the Sixth Amendment as applicable to the State's through the Fourteenth Amendment. . . ." Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 1020, fn. 6, 47 L.Ed.2d 258 (1976). "In essence, the right to jury trial guarantees to the criminally accused a jury trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961).

"An 'impartial jury' is one where *each and every one* of the twelve members constituting the jury is totally free from any partiality whatsoever." Mares v. State, 490 P.2d 667, 668[3] (N.M. 1971). (Emphasis in original.) ". . . [A] trial by jury, one or more of whose members is biased or prejudiced, is not a constitutional trial." State v. Stiltner, 491 P.2d 1043, 1047 (Wash. banc 1971). ". . . [T]he right to trial by jury guarantees that each and all of those composing the jury be unbiased and without prejudice toward any party." Isabelle v. Proctor Hospital, 282 A.2d 837, 840[6] (Vt. 1971).

Missouri cases dealing with a challenge for cause based on the prejudice of a venireman are consistent with the foregoing principles. A criminal defendant is

entitled to a full panel of unqualified jurors before making his peremptory challenges. State v. Hopkins, 687 S.W. 2d 188 (Mo. banc 1985); State v. Zweifel, 570 S.W.2d 792 (Mo.App. 1978). If for any reason, statutory or otherwise, a venireman is not in a position to enter the jury box with an open mind, free from bias or prejudice, he is not a competent juror. State v. Carter, 544 S.W.2d 334, 337 (Mo.App. 1976). When it is shown that a venireman lacks impartiality, a challenge for cause must be sustained. State v. Hopkins, supra, 687 S.W.2d at 190[4]. When a venireman states that he cannot be a fair and impartial juror, "[t]here is no stronger way a venireman can tell the court and counsel that he will not be the kind of juror every criminal defendant is entitled to have." State v. Watson, 595 S.W.2d 754, 758 (Mo.App. 1980).

Out-state cases dealing with a claim of ineffective assistance of counsel based on counsel's failure to challenge a venireman, and decided after Strickland v. Washington, supra, include the following: Wicker v. McCotter, 783 F.2d 487 (5th Cir. 1986); Isom v. State, 682 S.W.2d 755, 757 (Ark. 1985); People v. Moody, 676 P.2d 691, 696 (Colo. banc 1984); Gordon v. State, 469 So.2d 795, 797 (Fla.App. 1985); Marsillett v. State, 495 N.E.2d 699, 706 (Ind. 1986); State v. Pender, 687 S.W.2d 714, 718 (Tenn.Cr.App. 1984); Parker v. State, 693 S.W.2d 640 (Tex.App. 1985). In those cases, except in *Gordon*, it was not established that counsel was ineffective.

In *Wicker* counsel explained his decision to accept the questioned venireman, and the court held that counsel reached a strategic decision "of the kind that able defense counsel frequently make. This is effectiveness, not ineptness." In *Moody* counsel plausibly explained

his decision not to challenge a certain venireman as a matter of trial strategy. In *Marsillett* the court said that challenging a venireman is a matter of trial strategy and the failure to remove a venireman who has some relationship to the victim or the defendant, "without more," does not demonstrate ineffective assistance. In *Isom* and in *Pender* the court held that the petitioner failed to show that the venireman was biased and that he had a burden to do so. In *Parker* the court emphasized the importance of having a record showing the reason for counsel's failure to challenge the venireman but refrained from granting petitioner relief. The venireman had stated that if the defendant failed to testify she would assume that he was "hiding something." In *Gordon* ineffective assistance of counsel was found where counsel was guilty of several deficiencies including permitting a woman to sit as a juror when she had stated on voir dire that she was biased.

Citing *Strickland v. Washington,* supra, the state argues that in view of the strong evidence presented at the trial, movant makes no showing that but for counsel's alleged error the outcome of the trial would have been different. The state relies on the "prejudice" requirement of *Strickland.*

The instant record shows that the jury contained one juror who was, by his own admission, biased. That was tantamount to a denial of the right to trial by jury. It is no answer to say that the other 11 jurors were free of bias and all of them agreed upon a verdict of guilty. "A constitutional jury means twelve men as though that number had been specifically named; and it follows that, when reduced to eleven, it ceases to be such a jury quite as effectively as though the number

had been reduced to a single person." Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 256, 74 L.Ed. 854 (1930).[2]

The instant situation, this court holds, is an example of the type the Court envisioned by the language in *Strickland*: "In certain Sixth Amendment contexts, prejudice is presumed." There was here a denial of the right to trial by jury. This fits the *Strickland* language, at 104 S.Ct. 2067, that "prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost."

The state also argues that movant waived the biased juror matter by not raising it on direct appeal, and cites such cases as Smith v. State, 684 S.W.2d 520 (Mo.App. 1984), and McGrath v. State, 671 S.W.2d 420 (Mo.App. 1984). In *Smith* the claim of ineffective assistance of counsel was based on counsel's failure to move to quash the jury panel on grounds of intentional exclusion of blacks. In *McGrath* the claim of ineffective assistance of counsel was based on counsel's failure to object to the jury selection process. Those cases are distinguishable. Neither of them involved a situation where an admittedly biased person sat on the jury which returned the challenged conviction.

Moreover, even if movant, on the direct appeal from the jury trial, had attacked the verdict on the ground that venireman Cates was an incompetent juror, it is not clear that his appeal would have succeeded. His counsel had made no challenge to venireman Cates, and

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2. In Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 1905, 26 L.Ed.2d 446 (1970), the Court held: "The twelve-man requirement cannot be regarded as an indispensable component of the Sixth Amendment," and upheld a criminal conviction in a Florida state court by a six-member jury.

there was no record, as there now is in this Rule 27.26 proceeding, to show the reason Cates was not challenged for cause. Although the judge at a jury trial has authority to act on his own initiative in excusing a juror, the general rule is that he has no duty to do so.[3] State v. Overby, 432 S.W.2d 277 (Mo. 1968); State v. Anderson, 384 S.W.2d 591 (Mo. banc 1964); State v. McWilliams, 370 S.W.2d 336 (Mo. 1963); State v. Naylor, 40 S.W.2d 1079 (Mo. 1931); State v. Woods, 662 S.W.2d 527 (Mo. App. 1983); State v. Johnson, 637 S.W.2d 290 (Mo.App. 1982); State v. Dodson, 595 S.W.2d 59 (Mo.App. 1980); State v. Marshall, 571 S.W.2d 768 (Mo.App. 1978); State v. Lane, 551 S.W.2d 900 (Mo.App. 1977); State v. Morrison, 545 S.W.2d 376 (Mo.App. 1976); State v. Gamache, 519 S.W.2d 34 (Mo.App. 1975). In *McWilliams, Naylor,*

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3. ABA Standards for Criminal Justice Standard 15-2.5 (1986) reads, in pertinent part: "If the judge after examination of any juror is of the opinion that grounds for challenge for cause are present, the judge should excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause. . . ."

The commentary under Standard 15-2.5 reads, in pertinent part: ". . . Although the standard emphasizes the responsibility of a judge to excuse prospective jurors when appropriate, this does not mean that a defendant may make no challenge and then later complain because the judge did not excuse a juror without challenge. Failure of the judge to act without defense challenge having been made is not in itself grounds for subsequent objection. . . ."

The United States Supreme Court has at least implied that there may be a situation where the trial court, in the absence of a challenge to a venireman, must disqualify him of its own motion. In Frazier v. United States, 335 U.S. 497, 69 S.Ct. 201, 210, 93 L.Ed. 187 (1948), the court said: "Whether or not employment in the Treasury outside the Narcotics Bureau would constitute ground for challenge for 'actual bias,' such employment in the connections disclosed here affecting Moore and Root was not so obvious a disqualification or so inherently prejudicial as a matter of law, in the absence of any challenge to them before trial, as to require the court of its own motion or on petitioner's suggestion afterward to set the verdict aside and grant a new trial."

Woods, Dodson, Marshall, and *Morrison,* the trial judge on his own initiative excused a juror. In *Overby, Anderson, Johnson, Lane,* and *Gamache,* the trial judge took no action with respect to a juror whose qualifications were not timely challenged. In all of those cases the convictions, on direct appeal, were affirmed.

It is also unlikely that movant's present claim of ineffective assistance of counsel would have succeeded or even have been entertained on his direct appeal from the jury case because, ordinarily, such a claim is properly handled in a Rule 27.26 proceeding rather than on a direct appeal from the criminal conviction. State v. Williams, 652 S.W.2d 102, 116[37] (Mo. banc 1983); State v. Mitchell, 620 S.W.2d 347, 348[3] (Mo. banc 1981).

It must be remembered that there was no *complete* transcript of the voir dire examination until the conclusion of the motion hearing, at which time it was compiled and admitted into evidence by agreement. The motion court did not clearly err in rejecting the state's argument of waiver in not raising the point on appeal because it could reasonably infer that it would have been futile to do so. Although the state argues that the defendant himself, as distinguished from his counsel, waived the error by not complaining of it in post-trial pleadings which he filed pro se, it cannot be said that the trial court clearly erred in ruling otherwise.

There is nothing in the instant record to suggest that counsel's failure to challenge venireman Cates for cause stemmed from any motive to "sandbag." Counsel's mistake, although flagrant, was unintentional. The right to effective assistance of counsel "may in a particular case be violated by even an isolated error of counsel

if that error is sufficiently egregious and prejudicial." Murray v. Carrier, ... U.S. ....., 106 S.Ct. 2639, 2650 [8], 91 L.Ed.2d 397 (1986).

This court holds that the judgment of the trial court granting relief on the ground under consideration is not clearly erroneous. The brief of movant on his cross-appeal states, "If this court affirms the decision of the hearing court, the issues raised herein will be moot." Accordingly, the appeal in No. 15188-2, Kenneth Presley, Movant-Appellant, vs. State of Missouri, Respondent, is dismissed.

The judgment is affirmed.

George M. Flanigan, Judge

CROW, C.J. - concurs.

HOGAN, J. - concurs.

MAUS, J. - files dissenting opinion.

GREENE, J. - concurs.

PREWITT, J. - files dissenting opinion.

HOLSTEIN, J. - concurs.

IN THE MISSOURI COURT OF APPEALS
Southern District
en banc

No. 15177

KENNETH PRESLEY,
Movant-Respondent,

vs.

STATE OF MISSOURI,
Appellant.

No. 15188

KENNETH PRESLEY,
Movant-Appellant,

vs.

STATE OF MISSOURI,
Respondent.

DISSENTING OPINION

I dissent. I do so for two reasons. First, I do not believe the movant has shown "a reasonable probability" that but for the error of counsel the result of his trial would have been different as required by *Strickland*. Second, I believe that the movant waived the right to assert ineffective assistance of counsel by reason of that error.

The applicability of the principles upon which each of these reasons is based depends upon the extent of the infringement of the constitutional right involved. The

failure of counsel to challenge juror Cates for cause is the infringement involved. That failure must be considered in context. For example, in the opening of the voir dire the trial court described the case and posed the following question to the panel with the following result:

> THE COURT: Now, is there any of you that because of the nature of the case feel that you couldn't be fair and impartial?
>
> (No one responds).

Thereafter, the prosecuting attorney emphasized the importance of a fair and impartial jury. Defense counsel then posed the following question with the following result:

> Is there anyone else who perhaps feels the same way that they could not give my client a fair trial because of the nature of the charges against him?
>
> (No one responds).
>
> MR. SEIGEL: I take it by your silence everyone else, then, could give him a fair trial.

Thereafter were the questions asked and answers given that are quoted in the majority opinion. After the jury and an alternate were selected, the instructions they were given concerning their duties included the following: "Faithful performance by you of your duties as jurors is vital to the administration of justice. You should perform your duties without prejudice or fear, and solely from a fair and impartial consideration of the whole case." MAI-CR 2d 2.01.

Under these circumstances, I do not believe the presence on the jury of one member who said he'd "be a little partial" against the movant to be tantamount to the total denial of the right to trial by jury. As hereafter developed, I do not believe Cates' presence establishes an infringement so egregious as to obviate movant's burden under the second prong of *Strickland*. Also, as hereafter developed, I do not believe failure to challenge juror Cates was such a fundamental infringement as to nullify the contemporaneous objection rule. The relationship between the two doctrines is discussed in *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2070, 80 L.Ed.2d at 700.

The motion court granted relief because it found counsel's error to be ineffective assistance of counsel contrary to the Sixth Amendment. It made no express finding concerning the requirement of prejudice as defined in *Strickland*. The majority opinion holds that the error per se entitles the movant to a vacation of his sentences without an examination of prejudice under the second prong of *Strickland*.

Strickland does recognize that an infringement upon the right to counsel may be so grave as to create a presumption of prejudice. It cites the "[a]ctual or constructive denial of the assistance of counsel altogether" and counsel burdened with an actual conflict of interest. Id., 466 U.S. at 692, 104 S.Ct. at 2067, 80 L.Ed.2d at 696. The exception has been discussed as follows:

> Notwithstanding this general standard, a defendant who demonstrates a complete denial of any assistance of counsel need not satisfy the second prong of the inquiry. Denial of the assistance of counsel may occur when an attorney is present but refuses to

> assume the role of advocate, as well as when there is no appointment of counsel. See Javor v. United States, 724 F.2d 831 (9th Cir. 1984). 'Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost.' *Strickland,* 104 S.Ct. at 2067.

State v. Harvey, 692 S.W.2d 290, 292 (Mo. banc 1985). However, the general scope of the requirement of prejudice is expressed in the following language:

> Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an effect on the defense.

Strickland, 466 U.S. at 693, 104 S.Ct. at 2067, 80 L.Ed.2d at 697.

The absence of prejudice as required by *Strickland* has been held to be decisive in innumerable cases. The cases include errors of counsel in the following respects. Failure to request an instruction on accomplice testimony. Krist v. Foltz, 804 F.2d 944 (6th Cir. 1986). Failure to object to improper argument. Estes v. State, 111 Idaho 430, 725 P.2d 135 (1986). Outrageous behavior of counsel. Ward v. State, 461 So.2d 724 (Miss. 1984). Failure

to object to improper evidence and argument. State v. Stirrup, 469 So.2d 845 (Fla.App. 3 Dist. 1985). Failure to present exculpatory evidence. Orsini v. State, 287 Ark. 456, 701 S.W.2d 114 (1985); Estes v. State, supra. Disruptive conduct resulting in counsel being held in contempt. Rogers v. State, 721 P.2d 805 (Okla.Crim. App. 1986). It is also held the failure to make an objection, which if overruled, would result in reversible error does not per se establish ineffective assistance. State v. Stirrup, supra.

The factor emphasized in the majority of such cases has been the possible decisive effect of the error when measured by the strength of the state's case. Krist v. Foltz, supra; McAdoo v. United States, 515 A.2d 412 (D.C. App. 1986); State v. Harper, 218 Neb. 870, 359 N.W.2d 806 (1984). Such consideration has been expressed in a syntax of which the following are typical. "This overwhelming evidence of guilt makes the determination by the jury in this case thoroughly reliable. Accordingly, the errors of trial counsel—and they were many—were not so serious as to deprive Ward of a fair trial, a trial whose result is reliable." Ward v. State, supra, at 727. "Even if a successful motion for mistrial had been made, there is a reasonable probability that the outcome of a new trial would not have been any different in light of the overwhelming weight of the evidence." State v. Stirrup, supra, at 848.

> The record affirmatively demonstrates, in light of the overwhelming evidence presented by the State, that even if counsel had acted ineffectively, Micko has not offered proof establishing a reasonable probability that the outcome of his trial would have been

> any different or that the factfinder would have had a reasonable doubt over his guilt.

State v. Micko, 393 N.W.2d 741, 747-748 (N.D. 1986). "When we consider the entire record of defendant's trial, we cannot say that defense counsel's failure to object to prosecutorial remarks or to tender preferred jury instructions so prejudiced defendant that the outcome of the case would have been different had trial counsel been more thorough in these instances." People v. Jones, 148 Ill.App.3d 345, 101 Ill.Dec. 922, 499 N.E.2d 510, 516 (1986).

No case has been cited or found analyzing in detail an error of counsel resulting in the selection of a juror such as Cates. However, in Parker v. State, 693 S.W.2d 640 (Tex.App. 9 Dist. 1985), a juror said she thought the defendant should take the stand. In holding counsel's failure to challenge that juror did not result in reversible ineffective assistance of counsel, the court said: "Appellant has not shown—with Williford struck—that the result of the proceeding would have been different." Id. at 643. State v. Hockstein, 216 Neb. 515, 344 N.W.2d 469 (1984) is a similar case.

Obviously, the possible decisive effect of the presence of a partial juror must be measured with utmost caution. The bias of a juror may range from "a little partial" to an obdurate determination to vote guilty in spite of strong evidence to the contrary.

The failure of counsel to object to improper evidence or argument unfavorable to a defendant to some degree causes a jury to be partial against a defendant. The same is true of failure to produce admissible evidence favorable to a defendant. The influence of such an error against a defendant ranges from slight to devastating. Such an

error can have a more profound effect than the presence of a juror who is a little partial. Yet, such professional errors are consistently held to provide a basis for relief only when they are found to result in prejudice to a defendant within the meaning of *Strickland*. The same requirement should be applicable when the error of counsel permitted one to serve as a juror who was a little partial against the movant.

The following is the basic requirement to establish prejudice: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

Strickland also declares the standards to be followed in determining the existence of such prejudice include the following: "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." Id., 466 U.S. at 695, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. "[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id., 466 U.S. at 695, 104 S.Ct. at 2069, 80 L.Ed.2d at 698. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Id.

The context of Cates' answer has been noted. It establishes his sincerity. The transcript of the evidence resulting in the movant's convictions has been reviewed.

It is sufficient to observe the evidence of his guilt is overwhelming. He does not contend otherwise. I find it impossible to believe a decisionmaker, reasonably conscientious, impartially following the instructions of the trial court, would have a reasonable doubt concerning the movant's guilt or assess less severe punishment than the jury in question. As stated, I would deny relief because the movant did not show a reasonable probability that but for counsel's error the result of his trial would have been different.

Furthermore, I do not believe the movant has the right to complain of the presence of Cates upon the jury. The total surrender or waiver of the right of trial by jury is generally considered to be so fundamental that it is effective only when the result of a deliberate bypass or an express waiver, that is an intentional abandonment of a known right as enunciated in Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). See Rule 27.01. However, it is generally held that the right to complain of the qualifications of a juror is preserved only when an objection is made as required by the contemporaneous objection rule. In the absence of a contemporaneous objection, such a complaint will be heard only upon a showing of cause for noncompliance and of actual prejudice resulting from a constitutional violation as delineated in Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).

In Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), a petitioner sought relief because of the admission of inculpatory statements allegedly made in the absence of an adequate Miranda warning without holding a preadmission hearing required by Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908,

1 A.L.R.3d 1205 (1964). The court based the rejection of that contention upon the absence of a contemporaneous objection and the following reasoning:

> We believe the adoption of the Francis [v. Henderson, 425 U.S. 536, 48 L.Ed.2d 149, 96 S.Ct. 1708 (1976)] rule in this situation will have the salutary effect of making the state trial on the merits the 'main event', so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing. There is nothing in the Constitution or in the language of § 2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings. If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.

Wainwright v. Sykes, supra, 433 U.S. at 90, 97 S.Ct. at 2508, 53 L.Ed.2d at 610. Also see Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Smith v. Murray, 477 U.S. ....., 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

Cases holding the contemporaneous objection rule applicable to the disqualification of a juror include the following. Lollar v. State, 422 So.2d 809 (Ala.Crim.App. 1982); State v. Bravo, 131 Ariz. 168, 639 P.2d 358 (Ariz. App. 1981); Buck v. State, 151 Ga.App. 252, 259 S.E.2d

493 (1979); Bias v. State, 561 P.2d 523 (Okla.Crim.App. 1977), cert. denied, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977).

The rule has been held applicable not only to an objection based upon known facts but also upon those discoverable with due diligence during voir dire. Robinson v. Monsanto Co., 758 F.2d 331 (8th Cir. 1985); Beasley v. State, 337 So.2d 80 (Ala.Crim.App. 1976); Vaughn v. State, 173 Ga.App. 716, 327 S.E.2d 747 (1985); State v. Chattley, 390 A.2d 472 (Me. 1978); Commonwealth v. Fudge, 20 Mass.App. 382, 481 N.E.2d 199 (1985); Smith v. State, 651 P.2d 1067 (Okla.Crim.App. 1982); Southern Welding Works, Inc. v. K & S Const. Co., 286 S.C. 158, 332 S.E.2d 102 (1985). The general rule has been stated:

> Although 'the guaranty of trial by jury insures to a defendant in a criminal case the right to have the facts in controversy determined by twelve impartial jurors [citation] . . . this rule does not relieve a defendant of his duty to ascertain whether impartiality exists.' (People v. Ward (1965), 32 Ill. 2d 253, 258-59, 204 N.E.2d 741, 744, cert. denied (1966), 384 U.S. 1022, 86 S.Ct. 1947, 16 L.Ed.2d 1026.)

People v. Escobedo, 151 Ill.App.3d 69, 104 Ill.Dec. 603, 502 N.E.2d 1263, 1275 (1986). The general rule is observed in this state. Herron v. State, 614 S.W.2d 715 (Mo.App. 1981); Benson v. State, 611 S.W.2d 538 (Mo. App. 1980); Thompson v. State, 569 S.W.2d 380 (Mo.App. 1978).

Of course, the obligation to pose a timely objection generally rests upon counsel. A failure to do so may constitute ineffective assistance of counsel, as held in the

majority opinion. Indeed, ineffective assistance of counsel may constitute the cause for a procedural default within the meaning of Murray v. Carrier, 477 U.S. ....., 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) and Francis v. Henderson, supra. A concern about counsel's failure to challenge a partial juror has been expressed in the following language. "If this is developed on voir dire an aggressive attorney for any defendant could then fail to challenge and probably the State would not challenge nor would the judge, sua sponte, challenge or remove the venireperson. Hence, built-in reversible error would have been calculated and invited by the defendant's attorney." Parker v. State, supra, 693 S.W.2d at 642.

In some circumstances the spirit of the contemporaneous objection rule imposes a duty upon a defendant to personally voice an objection upon the basis of facts known to him. Illustrative cases include the following. In People v. Escobedo, supra, a juror was excused upon a peremptory challenge by the defendant. Nevertheless, that person served on the jury and was elected foreperson. On appeal the defendant contended that irregularity vitiated his conviction. The state contended the defendant waived the same by failing to raise the objection before the trial court. The court rejected the defendant's contention.

> After consideration of the jurisprudence of this State and other jurisdictions, we conclude that the defendant had a duty to ascertain whether the jury as impaneled was properly selected and to advise the trial court of any infirmity in the jury as sworn at the earliest opportunity. Regardless of whether the challenged prospective juror remained with the selected jurors during the court's voir dire of remaining

> venire and was therefore visible for defense to recognize, there is nothing in the record which indicates that *defendant or his attorney* was prevented from viewing Mrs. Anderson as she participated in the jury's hearing of the evidence at trial. Indeed, before the jury's verdict was announced, Mrs. Anderson advised the trial court that one of the verdict forms had been mistakenly signed. Under the circumstances of this case, we determine that defendant waived review of this issue by neglecting to recognize and call to the court's attention the fact that a prospective juror whom defendant had peremptorily challenged was in fact in service upon the jury.

People v. Escobedo, supra, at 1275 (emphasis added).

In Spencer v. Hopper, 243 Ga. 532, 255 S.E.2d 1 (1979), a defendant by a pro se motion challenged the array of jurors. The motion was not then passed upon. Upon the completion of voir dire, defense counsel informed the court he would not insist upon the motion. In a habeas corpus proceeding the court refused to consider the defendant's challenge.

> However, Spencer argues that since his motion was filed pro se, it could not be waived absent the trial judge questioning the defendant directly as to his wishes in this matter. But this overlooks the rule that whether or not to proceed with such a motion is a decision of trial tactics in counsel's hands. See Reid v. State, 235 Ga. 378, 379, 219 S.E.2d 740 (1975). Defense counsel refused to allow the district attorney to direct the question to the defendant personally and although the defendant had spoken out previously, he evidenced no objection to his attorney's refusal to

> pursue the motion at that time. It would appear that the *defendant and his attorney* were satisfied with the jury which had been selected, at least with the panels as composed prior to striking.

Id. at 3-4 (emphasis added).

In State v. Chattley, supra, a defendant had knowledge of a confrontation with a juror which was not disclosed upon voir dire. On appeal the defendant's objection to the court's failure to strike that juror was rejected. "It is beyond dispute that at the time of the voir dire defendant Chattley had knowledge of the altercation in which he had himself participated with Mr. Hamor. His failure to raise the objection at that time precludes his raising it at a later date." Id. at 477.

In Lollar v. State, supra, the defendant had personal knowledge of a juror being arrested for a drug offense. This fact was not revealed during voir dire. The defendant first told his attorney after the jury returned a guilty verdict. The defendant's point on appeal based upon the disqualification of this juror was rejected. "[T]he defendant possessed specific information which conflicted with Ms. Keith's failure to respond and which demanded, upon the exercise of reasonable and due diligence, further inquiry. The diligence required to prevent a waiver must be exercised by defense counsel *and the defendant.*" Id., 422 So.2d at 812 (emphasis added).

The duty of a defendant to object to the qualifications of a juror is similar to the duty of a defendant to object to misconduct by a juror.

> It is well-established that where misconduct of jurors is first presented in the motion for new trial, an

> affirmative showing must be made that *both defendant and his attorney* were ignorant of the misconduct until after the trial. State v. Turley, 452 S.W.2d 65, 69 (Mo. 1970); State v. Reeder, 394 S.W.2d 355, 357 (Mo. 1965); State v. Flinn, 96 S.W.2d 506, 513 (Mo. 1936); State v. McGee, 336 Mo. 1082, 1093, 83 S.W.2d 98, 104-05 (1935); State v. Gilmore, 336 Mo. 784, 789, 81 S.W.2d 431, 433 (1935); State v. McVey, 66 S.W.2d 857, 859 (Mo. 1933); State v. Palmer, 581 S.W.2d 952, 953 (Mo.App. 1979); State v. Bollinger, 560 S.W.2d 606, 608 (Mo.App. 1978); State v. Warren, 469 S.W.2d 662, 663 (Mo.App. 1971). The reason for the rule is that a defendant is not entitled to wait until the verdict is in, gambling on a favorable verdict, then seek a new trial if a verdict of guilty is returned.

State v. Brown, 599 S.W.2d 498, 502 (Mo. banc 1980), cert. denied, 449 U.S. 985, 101 S.Ct. 402, 66 L.Ed.2d 247 (1980) (emphasis added).

Other cases also recognize that when a defendant is aware of a decision made by his counsel, the defendant may waive his right to complain by acquiescence in that decision. "The trial court gave defendant's attorney a clear chance to act in his capacity as spokesman for defendant and the person in charge of defendant's case. Defense counsel made a trial strategy decision and moved on it without any apparent protest from defendant." State v. Fitzpatrick, 676 S.W.2d 831, 836 (Mo. banc 1984). "Since we hold that petitioner neither personally waived his right *nor acquiesced* in his lawyer's attempted waiver, the judgment of the Supreme Court of Ohio must be and is reversed . . . ." Brookhart v. Janis, 384 U.S. 1, 8, 86 S.Ct. 1245, 1249, 16 L.Ed.2d 314, 319 (1966) (emphasis added). In Estelle v. Williams, 425 U.S. 501, 96

S.Ct. 1691, 48 L.Ed.2d 126 (1976), a defendant's failure to object to appearing in prison garb was held to bar a subsequent assertion of error on that basis. "A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error." Hernandez v. Beto, 443 F.2d 634, 637 (5th Cir. 1971), cert. denied, 404 U.S. 897, 92 S.Ct. 201, 30 L.Ed.2d 174 (1971). Also see Murch v. Mottram, 409 U.S. 41, 93 S.Ct. 71, 34 L.Ed. 2d 194 (1972), in which a defendant was bound by his counsel's decision not to assert a basis for relief in a post-conviction proceeding. In so holding the court had the following observation:

> Concededly, Mottram testified at the hearing in the District Court that he did not intend to waive his constitutional attacks on the underlying 1960 convictions. But if a subjective determination not to waive or to abandon a claim were sufficient to preclude a finding of a deliberate bypass of orderly state procedures, constitutionally valid procedural requirements, such as those contained in the Maine statute requiring the joining of all bases for attack in one proceeding, would be utterly meaningless.

Murch v. Mottram, supra, 409 U.S. at 46, 93 S.Ct. at 74, 34 L.Ed.2d at 199.

In the underlying case the movant was in the courtroom throughout his trial. The record demonstrates he was aware of the response of juror Cates and its significance. In view of counsel's misconception, the movant's position was that of a defendant with personal knowledge of a juror's infirmity or misconduct when his counsel had no such knowledge. With his knowledge and appreciation of the significance of Cates' response, the

movant was under a personal obligation to exercise due diligence to voice an objection to the qualifications of juror Cates. A defendant with such knowledge and appreciation should not be permitted to "sand bag" the finality of a trial by first voicing an objection after a verdict of guilty. "To permit such a challenge to be pursued now would simply mean that no one would make a jury challenge until after they were convicted and that conviction was affirmed on appeal." Spencer v. Hopper, supra, at 4.

If the movant did not voice an objection to Cates' continued presence to counsel, he failed to exercise due diligence. Movant testified that in open court he voiced such an objection to counsel and counsel refused to pursue it. The transcript of the trial proceeding conclusively rebuts this assertion. Moreover, that record establishes the movant, with knowledge and appreciation of the same, acquiesced in counsel's actions. His subjective intent cannot now refute that acquiescence. The movant's failure barred consideration of the disqualification of juror Cates on direct appeal. That being so, movant cannot now inject vitality into an unexpressed objection under a charge of ineffective assistance of counsel.

I have examined the points raised by movant in his cross-appeal. As did the motion court, I find no merit in them. I would reverse the judgment of the trial court and enter judgment denying movant's motion under Rule 27.26.

Almon H. Maus, Judge

No. 15177

KENNETH PRESLEY,
Movant-Respondent,

vs.

STATE OF MISSOURI,
Appellant.

No. 15188

KENNETH PRESLEY,
Movant-Appellant,

vs.

STATE OF MISSOURI,
Respondent.

DISSENTING OPINION

I respectfully dissent. The majority opinion does a thorough and admirable job of analyzing the authorities and the problems in a case such as this, but I disagree with the conclusion reached.

Certainly movant's counsel erred. If a challenge for cause had been made it would have been error not to have excused venireman Cates. However, I believe movant has failed to meet the applicable burden for relief established in Strickland v. Washington, 466 U.S. 668 (1984).

I agree that as indicated in *Strickland,* 466 U.S. at 692, there are situations where prejudice from ineffective

assistance of counsel can be "presumed". Counsel's error resulted in a juror serving who said he was a "little partial" against movant. That should not be enough for a presumption of prejudice entitling movant to a new trial where, as here, counsel was otherwise effective and in my view movant received a fair trial although, as is always the case, not a perfect one.

I would reverse because movant failed to satisfy the standard in *Strickland* for him to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. There is no basis to believe that the presence of juror Cates probably affected the outcome. On the evidence here it is highly unlikely that counsel's error changed the result.

James K. Prewitt, Judge

(Filed April 16, 1987)

IN THE
CIRCUIT COURT OF GREENE COUNTY, MISSOURI
DIVISION 3

Case No. CV185-2293-CC-3

KENNETH R. PRESLEY,
Movant,

vs.

STATE OF MISSOURI,
Respondent.

MEMORANDUM AND ORDER

This is an action under Civil Rule 27.26 to vacate, set aside or correct convictions under the criminal statutes. On September 16, 1985, the Movant filed his motion under Rule 27.26 with the Circuit Clerk of Greene County, although it was not officially shown filed until October 23, 1985. On September 17, 1985, the sentencing Judge wrote for a clarification of Movant's request for disqualification of Judge and received that clarification on September 26 of 1985. In the letter received September 26, 1985, the Movant asked for a disqualification of the sentencing Judge. The sentencing Judge then disqualified and the case was transferred to this Judge on October 23, 1985.

By docket entry on October 28, 1985, the Court set a hearing on the motion at 10:00 o'clock A.M. on April 7,

1986 and appointed the Public Defender to represent Movant. On January 17, 1985, Movant was directed to file a more "lawyer-like" pleading within 45 days. The amended motion under Rule 27.26 was filed March 5, 1986.

On April 3, 1985, Movant requested a continuance of the trial and the trial was reset for 10:00 o'clock A.M. on June 5, 1986. Again, Movant's second motion for continuance was sustained on April 29, 1986 and the case was set for hearing at 10:00 o'clock A.M. on November 5, 1986.

On November 5, 1986, the Movant appeared in person and with attorneys Ron Conway and Anne Lyons. The State appeared by Assistant Prosecuting Attorney Cynthia Rushefsky. Before hearing evidence, the Movant orally complied with Rule 27.26(c) on the record by stating, on his oath, that all motions then filed stated all grounds known to him for setting aside, vacating or correcting the sentences and that the facts alleged were true.

Trial by Court was conducted. The original motion received by the Circuit Clerk on September 16, 1985, the amended motion filed March 5, 1986, the second amended motion filed October 10, 1986, the third amended motion filed October 24, 1986 and the physical interlineation on the amended motion (paragraph 7(F)) authorized on November 5, 1986, constitute the pleadings on which the case was tried.

The evidence showed that on December 29, 1983, Movant was charged by felony complaint filed before the Associate Circuit Judge, Circuit Court of Greene County, Associate Division 3, with seven counts of viola-

tions of criminal statutes. There was no change of Judge announced or requested from the Associate Circuit Judge of Associate Division 3 before whom the complaint pended and there was no reassignment of the complaint to another Judge before a preliminary hearing. However, on January 23, 1984, a different Associate Circuit Judge, the Associate Circuit Judge sitting in Associate Division 1, Circuit Court of Greene County, conducted a preliminary hearing and bound Movant over for trial before a Circuit Judge on all counts. There is no evidence in the file that any party agreed in writing to the preliminary hearing before the Associate Circuit Judge in Associate Division 1 or that the case had been reassigned under appropriate authority. However, the capacity of the Judge who conducted the Preliminary Hearing is not raised herein.

On January 26, 1984, a felony information was filed in seven counts and assigned to the Circuit Judge, Division 4, Circuit court of Greene County, who ultimately conducted a jury trial on all counts.

On January 27, 1984, the Movant entered pleas of not guilty to all seven counts.

On March 20, 1984, Movant filed a request for change of Judge. On March 26, 1984, the request for change of Judge was denied.

On April 2, 1984, jury trial began. On April 3, 1984, a jury verdict was received by the Court after a deliberation from 6:05 P.M. to 9:14 P.M., finding the Movant guilty of all seven counts and fixing punishment as follows:

Count I - Sexual Abuse, 2nd Degree - 1 year County Jail;

Count II - Abuse of a Child - 5 years;

Count III - Sexual Abuse, 1st Degree - 3 years;
Count IV - Rape - 12 years;
Count V - Rape - 12 years;
Count VI - Rape - 12 years;
Count VII - Rape - 12 years.

No docket entry was made extending the time of filing a motion for new trial. A motion for new trial was filed on April 23, 1984, heard on that date and overruled on that date.

On April 23, 1984, the sentence and judgment of the Court was announced. The Movant was sentenced in accordance with the jury recommendations. The Movant was ordered committed to the Department of Corrections and the sentences to the Department of Corrections were ordered to run consecutive to each other and the sentence on Count I to the Greene County Jail was ordered to run consecutive to and following the sentences to the Department of Corrections.

An appeal by Movant to the Missouri Court of Appeals, Southern District, followed. The mandate affirming the judgment and sentences was filed on August 13, 1985, after a motion for rehearing and transfer was denied. See State v. Presley, 694 S.W. 2d 867 (Mo.App. S.D. 1985). Apparently no issue was raised on the appeal of the late filing of a motion for new trial and all points raised were considered. See Rule 29.11(f).

The Court has concluded that all grounds stated by Movant herein are without merit, except one ground. To satisfy the provisions of Rule 27.26 requiring findings of fact, the Court will attempt to make findings on all grounds found to be without merit first, then discuss one ground separately.

Movant's claim that joinder and joint trial of separate offenses and mandatory consecutive sentencing is unconstitutional and that Section 558.026, Missouri Revised Statutes, is unconstitutional, is without merit. There is no evidence that Movant was denied a fair and impartial trial because the offenses were joined together in the information, or tried together. The Court does not believe counsel waited until the last minute to prepare the case for trial. The Court does not believe Movant was prejudiced by last-minute preparation, that counsel failed to call important witnesses at trial, or that counsel failed to "surface" facts that at least some of the victims lied on other people or were caught in acts with other people. The Court finds the Movant was not denied the benefits of a Missouri Criminal Sexual Psychopath law. The Court does not believe, and there was no evidence, that the Prosecutor was prejudiced, that the entire Prosecutor's office should have removed itself, or that the Prosecutor, or any of the Assistant Prosecutors, were disqualified; and, Movant was not denied due process of law thereby.

As to the additional allegations contained in the First Amended Motion: the Court does not believe trial counsel failed to investigate the circumstances surrounding Movant's statement to the police or failed to discuss the circumstances thereof with Movant, and the Court does find that any Motion to Suppress such statement would have been denied. There was no necessity to endorse rebuttal witnesses and a challenge to such witness on that ground would have been unsuccessful. Movant's allegations concerning a failure to consult during the preparation of the appellate brief is probably answered by the per curiam Opinion appearing at 694 S.W. 2d

873, in which the Court states that all of matters raised raised by Movant in his pro se brief on appeal were not worthy of observation; if counsel failed to contact during the appeal process, there was no prejudice thereby. The Court does find that trial counsel adequately and thoroughly investigated and made appropriate trial decisions with respect to the calling of witnesses and for those reasons was not ineffective for failure to call any particular witness or failure to ask any particular question alleged by Movant.

As to the second amended motion filed October 10, 1986: The Court finds that trial counsel was not informed that deposition of Lisa Ince was taken and his failure to discover such matter was not ineffective assistance of counsel.

The third amended motion filed October 24, 1986, restates grounds contained in his original motion in a different manner. The Court finds the statutes do not violate the equal protection clauses of the various United States and Missouri Constitutional provisions cited.

The Court does find and believe that Movant was denied effective assistance of counsel in his allegations that counsel failed to move for the discharge of Juror Francis Cates for cause. In making this determination the Court considers the transcript of voir dire examination, now filed herein and marked Court's Exhibit 1, which was ordered by the Court following the evidentiary hearing on November 5, 1986. The Court understands that all parties have agreed the transcript can be received as a part of the evidence in this case. The original appeal transcript was incomplete as to the voir dire examination.

The Court finds the following facts have been established by Movant in support of his motion herein:

1. During the voir dire examination on April 2, 1984, Movant's defense counsel asked if any member of the jury panel had been a victim of a crime of any kind. See Trial Transcript p. 6, line 18 and Court's Exhibit 1, p. 45, lines 17-22. (There are differences between the transcripts in that questions and responses are omitted from the Trial Transcript).

2. Juror Francis Cates responded by stating he had been a victim of burglary at home and burglary and armed robbery at his places of business. In addition, he stated his child had been "exposed by an exhibitionist about three years ago." Trial Transcript p. 7, lines 7-11.

3. Next, Juror Cates was asked the following question:

> "Anything about that or the burglary of seven years ago or your daughter's incident which would make you unable to sit in judgment fairly on my client, fairly today?" Trial Transcript, p. 7, line 17.

4. Juror Cates responded to the foregoing question as follows:

> "I don't, yes, I think I'd be a little partial to your client or against your client." Trial Transcript p. 7, line 21.

5. Next, defense attorney inquired:

> "You'd be partial to the State?" Trial Transcript p. 7, line 23.

6. Juror Cates responded with "Right." Trial Transcript p. 7, line 24.

7. The Trial Judge maintained a sheet of jurors' names and qualifications and next to the typed name of Juror Francis J. Cates thereon, the Trial Judge wrote "partial to State" in handwriting during the voir dire examination. See Movant's Exhibit 3, page 2.

8. The members of the jury panel, or Juror Cates in particular, were not asked at any stage of the voir dire examination whether they believed they could be or would be fair and impartial if selected as a member of the jury.

9. Juror Cates, frankly, intelligently, clearly and honestly answered all questions placed to him during voir dire examination and revealed he was partial to the State.

10. Defense counsel failed to request the removal of Juror Cates from the jury panel for cause.

11. Defense counsel was the sole counsel for Movant at the trial and the Court does believe that his duties in maintaining notes, mental and written, during his voir dire examination of the jury caused him to move to strike another juror from the panel for cause believing he was moving to strike the juror who answered as indicated above. The motion to strike another juror for a reason that could have been assigned to Juror Cates was denied.

12. This Court firmly believes the trial Judge would have sustained a motion to strike Juror Cates, if the motion had been made.

> 13. At page 9 of the Trial Transcript it is revealed that trial counsel wrote in his notes "prejudiced in favor of State" next to the name of another juror and this Court believes trial counsel attributed the statement of Juror Cates to another juror in his notes, by mistake. The Trial Judge did not correct defense counsel's identification of the juror making that response.

This is not a case in which a juror was not honest or candid. This is a case in which the juror scrupulously complied with all obligations and revealed that he was partial with a positive statement. Smith v. Phillips, 455 U.S. 209, 71 L.Ed. 2d 78 (1982) sets forth the procedure to be followed for implied juror bias where new facts are determined following trial. New facts are not determined in this case after trial. The partiality of the juror was revealed during the trial by a candid and forthright juror and the Trial Judge then concluded the juror was partial.

The right to a trial by an impartial jury lies at the very heart of due process. Irvin v. Dowd, 366 U.S. 717, 6 L.Ed. 2d 751 (1961). There is no higher purpose of government than the purpose to ensure that its procedures for enforcing public policies are fair. Without a fair and impartial jury there is no settled opinion that a determination of guilt is fair or reliable. See Estes v. Texas, 381 U.S. 532, 14 L.Ed. 2d 543 (1965). It is said that if the right to trial by jury is worth anything it must mean the right to a fair and impartial jury. Lee v. Baltimore Hotel Co., 136 S.W. 2d 695, 698 (Mo.1939). It is also said that the constitutional right to a trial by jury would be a mockery if it did not guarantee a jury

with minds free of bias. Littell v. Bi-State Transit Development Agency, 423 S.W. 2d 34, 36 (Mo.App.1967).

Courts jealously guard this high principle in the face of criticism that guilty may go free. This Court has no doubt that if trial counsel had raised the point of the partiality of the juror in this case during the original appeal, even though a motion to strike had not been made, the judgment would have been reversed on the original appeal. In State v. Hopkins, 687 S.W. 2d 188 (Mo.En Banc 1985), a sentence on a jury verdict of life imprisonment for first degree assault and concurrent 15-year terms for first degree assault and manslaughter was reversed for the failure of a trial judge to sustain a defense motion to strike a juror who was equivocal concerning the juror's ability to be fair and impartial. In the case at bar, the juror was not equivocal, but honestly and candidly stated a partiality. The recent case of State v. Johnson, 722 S.W. 2d 62 (Mo.En Banc 1986) is not in point, in that there the juror positively stated she would set aside her personal feelings and follow the law in the case. In the case at bar, that question was not posed to the particular juror in question or to the entire panel en masse and the record is left with the positive statement made by the juror that he would be partial to the State and the positive conclusion reached by the Trial Judge that he was partial to the State recorded in the trial Judge's notes.

For those reasons, the Court concludes that Movant was denied effective assistance of counsel during the trial of his case and on his appeal.

NOW, THEREFORE, acting under Civil Rule 27.26, Missouri Supreme Court, the Court vacates the Judg-

ments and Sentences in the case of State of Missouri v. Kenneth Ray Presley, Case No. CR583-807-FX-4 in the Circuit Court of Greene County imposed on April 23, 1984, orders a new trial on all counts of the information and taxes all costs herein to the State of Missouri.

Done this 16th day of April, 1987.

/s/ Don Bonacker
Don Bonacker
Circuit Judge, Division 3

(Filed March 5, 1986)

IN THE
CIRCUIT COURT OF GREENE COUNTY,
MISSOURI

CV185-2293CC4(3)

KENNETH R. PRESLEY, #149919
Missouri State Penitentiary,
Movant,

vs.

STATE OF MISSOURI,
Respondent.

AMENDED MOTION FOR VACATION, SETTING ASIDE AND CORRECTING CONVICTION AND SENTENCE UNDER PROVISIONS OF SUPREME COURT RULE 27.26

COMES NOW movant, by and through his court appointed counsel, Assistant Public Defender Ronald Conway, and hereby incorporates each and every fact and allegation set forth in his Pro Se Motion and amendments thereto, filed with this court, and further alleges:

1. Movant is an inmate at the Department of Corrections, Missouri State Penitentiary, Jefferson City, Missouri.

2. Movant was sentenced by the Circuit Court of Greene County, Missouri, Division 4, at Springfield in the State of Missouri.

3. Movant was sentenced under case number CR583-807FX4 for the offenses of second degree sexual abuse,

child abuse, sexual abuse in the first degree, and four counts of rape.

4. Movant was sentenced on January 27, 1984, to one year in the county jail for sexual abuse in the second degree, five years imprisonment for abuse of a child, three years imprisonment for sexual abuse in the first degree, twelve years imprisonment for rape, twelve years imprisonment for rape, twelve years imprisonment for rape, and twelve years imprisonment for rape, all sentences to run consecutively.

5. Movant was found guilty after pleas of not guilty and trial by jury.

6. Movant appealed the judgment and sentences in that cause to the Missouri Court of Appeals, Southern District, case number 13748, where the judgment was affirmed by opinion dated June 26, 1985, and reported at 694 S.W.2d 867.

7. That in representing movant at trial, and in preparing for trial counsel for movant failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances to movant's prejudice in the following respects, and each of them, such that the totality of misfeasance and nonfeasance by counsel violated movant's rights to due process and guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Missouri Constitution, and violated movant's right to counsel as guaranteed by the Sixth Amendment to the United States Constitution, and Article I, Section 18(a) of the Missouri Constitution.

A) Counsel failed to challenge Juror Francis Cates for cause, and allowed Juror Francis Cates to sit as a

member of the jury after Juror Cates had stated unequivocally that he would be partial towards the state. Such failure to exclude Juror Cates prejudiced movant in that he was denied his right to an impartial jury under RSMo. Section 494.190, and the Seventh Amendment to the United States Constitution and Article I, Sections 18(a) and 22(a) of the Missouri Constitution. Such failure by movant's counsel was far below the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances and prevented movant from being tried by a fair and impartial jury.

B) Counsel failed to investigate the circumstances surrounding movant's statement to the police, and failed to discuss the circumstances of the statement with movant, and failed to challenge the admissibility of the statement in a hearing outside the presence of the jury to suppress said statement because it was taken in violation of movant's right to counsel in that at the time of the statement, movant was told that he would be provided with an attorney only after signing the rights waiver form and appearing in court. Said statement was therefore inadmissible and would have been suppressed had counsel challenged its admissibility. Such failure of counsel prejudiced movant in that it deprived movant of a fair trial and effective assistance of counsel. Such failure of counsel was far below the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances and prevented movant from receiving a fair trial with effective assistance of counsel.

C) Counsel failed to challenge the testimony of State rebuttal witness Ricky Ince because said witness

was not endorsed as a witness by the prosecution in violation of Missouri Supreme Court Rule 25.03(A)(1) which requires disclosure of the names and addressed of all witnesses the State intends to call at trial. Had counsel challenged said testimony it would have been inadmissible, and failure to challenge the testimony deprived movant of his rights to a fair trial. Such failure to counsel was far below the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances and prevented movant from receiving a fair trial with effective assistance of counsel.

D) Counsel failed to require a complete transcript of the trial in order to preserve movant's rights to appeal and post-conviction relief. Such failure deprived movant of his rights to appeal because the court of appeals did not receive a complete record of the proceedings before, during and after the trial, and movant's rights to appeal were therefore prejudiced.

E) Counsel failed to contact movant during the preparation of the appeal brief and did not allow movant input into the appeal brief, thereby denying movant's right to effective assistance of counsel on appeal. Had counsel contacted movant, movant would have requested counsel to raise many more issues including but not limited to: unconstitutionality of sentencing statutes and procedures used, unlawful conduct of the judge in being more concerned with finishing in two days than with providing movant with a fair trial, prosecutorial misconduct in badgering movant on the witness stand and misquoting his statement, failure of the information to allege essential facts, failure by the court to define

the term "serious physical injury" as used in the instructions, unlawful joinder of offenses, and denial of the benefits of the criminal sexual psychopath laws. These issues would have been meritorious on appeal. Such failure of counsel to contact movant during the preparation of the appellate brief denied movant his rights to appeal and his rights to effective assistance of counsel on appeal.

F) Counsel failed to interview or call as witnesses at trial Bruce Love, David Presley and Wonda Wong after he had been informed of their existence and the nature of their testimony. Bruce Love, a minister, would have testified that he had been in the home on several occasions during the time in question and that there was absolutely no evidence of sexual misconduct going on. David Presley and Wonda Wong would have testified to specific instances of lying by the victims in order to impeach their credibility. Such failure prejudiced movant in that the victims were not shown to be liars as they could have been, thereby rendering their testimony unbelievable. Movant's right to effective assistance of counsel was deprived by such failure to elicit testimony favorable to movant because such failure was far below the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances.

G) Counsel failed to elicit from witnesses Vicky Presley, Dorthy Presley, Arvis Presley, and Ann Wong the fact that the victims were habitual liars, and that they could point to specific instances of such, in order to impeach the victims' testimony. Such failure was prejudicial to movant in that the victims were not shown

to be liars, as they could have been; thereby rendering their testimony unbelievable. Movant's right to effective assistance of counsel was deprived by such failure to elicit testimony favorable to movant because such failure was far below the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances.

H) Counsel failed to challenge the constitutionality of RSMo. Section 558.026.1, which requires mandatory imposition of consecutive sentences, as in violation of the due process and equal protection clauses of the Fourteenth Amendment, and in violation of the Fifth Amendment to the United States Constitution. Such failure prejudice movant in that the application of this statute creates an invidious discrimination and an arbitrary classification and violates such Constitutional provisions, and counsel failed to assert this at trial or on appeal, thereby precluding consideration of the claim. Movant was deprived of effective assistance of counsel because failure to raise these claims was far below the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances.

8. Herein in paragraph 8 movant will allege facts and witnesses which correspond to allegations set forth in paragraph number 7 above:

A) Movant will rely on the transcript of record in case number CR583-807FX4. Movant will rely also on his own testimony.

B) Movant will rely on the transcript of record in case number CR583-807FX4, and the court's file of said case. Movant will rely also on his own testimony.

C) Movant will rely upon the transcript of record, the court file in case number CR583-807FX4, and his own testimony.

D) Movant will rely on the transcript of record, his own testimony, and the testimony of Anna Hawley.

E) Movant will rely on his own testimony and that of Steven Seigal.

F) Movant will rely on the testimony of Bruce Love, David Presley and Wonda Wong, in addition to his own testimony. Movant will also rely on the transcript of record.

G) Movant will rely on the testimony of Vicky Presley, Dorothy Presley, Arvis Presley, and Ann Wong in addition to his own testimony. Movant will also rely on the transcript of record.

H) Movant will rely on the transcript of record, the court file in case number CR583-807FX4, and his own testimony.

9. Movant has filed a motion under Missouri Supreme Court Rule 27.26 which is amended by this present motion.

10. The grounds for release stated in this motion have not been previously set forth.

11. Movant was represented by Steven P. Seigal, 714 Plaza Towers, Springfield, Missouri, 65804, at all proceedings.

12. Movant is not under sentence from any other court.

WHEREFORE, movant prays for an evidentiary hearing to determine the issues raised herein and moves the

Court to vacate and set aside the judgment rendered herein and allow him a new trial.

Respectfully submitted,

/s/ Ronald Conway
Ronald A. Conway, Bar #32148
Assistant Public Defender
333 Park Central E., Suite 323
Springfield, MO 65806
831-7722
Attorney for Movant

STATE of Missouri,
Plaintiff-Respondent,

v.

Kenneth R. PRESLEY,
Defendant-Appellant.

No. 13748.

Missouri Court of Appeals,
Southern District,
Division II.

June 26, 1985.

Motion for Rehearing or Transfer
Denied July 23, 1985.

* * *

Stephen P. Seigel, Springfield, for defendant-appellant.

William L. Webster, Atty. Gen., Leah A. Murray, Asst. Atty. Gen., Jefferson City, for plaintiff-respondent.

MAUS, Judge.

By a multi-count information, the defendant was charged with seven sexual offenses. The alleged victims were his stepdaughter, 12 years old, and his adopted daughter, 9 years old. A jury found him guilty of each charge. By the imposition of consecutive sentences the defendant was sentenced to imprisonment for 56 years to be followed by a one-year sentence to the county jail. A detailed statement of the sordid facts is not necessary

for consideration of the five points presented by defendant's appeal.

The defendant concedes his motion for a change of judge was untimely filed. However, for his first point he contends the trial judge's self-disqualification was mandatory because the judge had acted in the adoption proceeding of one of the victims by defendant and his wife. The record does not show this to be true nor that self-disqualification was urged upon the trial judge. Nonetheless, the defendant argues the judge was prejudiced because of his reaction to participation in placing the child with one who allegedly abused her. The point will be considered ex gratia.

Self-disqualification is the subject of Rule 2, Canon 3 C. The basic criterion is that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, ..." It is not every familiarity with a defendant or a party involved in a proceeding that causes disqualification to be necessitated. For example, it has been so held where the judge was supervising the probation of one of the state's witnesses. *State v. Benson,* 633 S.W.2d 200 (Mo.App.1982). The same is true where the trial judge heard a defendant's abortive plea of guilty. *State v. Faber,* 499 S.W.2d 790 (Mo.1973).

One who is a judge is entitled to a presumption he will not undertake to preside in a trial in which he cannot be impartial. *Ramsey v. Grayland,* 567 S.W.2d 682 (Mo.App.1978). The trial judge's alleged past experience with the defendant and victim does not cast doubt upon that presumption. It does not cause his ability to be impartial to be reasonably questioned. Indeed, the record

demonstrates the trial judge accorded the defendant a fair trial as measured by the highest standard of judicial skill and impartiality. Cf. Rule 32.09; *Manis v. State*, 659 S.W.2d 337 (Mo.App.1983).

In the state's opening statement, the prosecuting attorney said the evidence would show the defendant's illicit sexual activities with his children also occurred on dates not charged. The defendant's objection to an impermissible reference to "other crimes" was overruled. For his second point the defendant contends this was reversible error.

The defendant did not object and does not assert error because the crimes charged and referred to involved different victims. Therefore, it is not necessary to treat at length a point that was not raised or preserved. Those interested may consult *State v. Simerly*, 463 S.W.2d 846 (Mo.1971); *State v. Applegate*, 668 S.W. 2d 624 (Mo.App.1984); *State v. McDaniels*, 668 S.W.2d 230 (Mo.App.1984); *State v. Hastings*, 628 S.W.2d 678 (Mo. App.1982); Annot., Evidence—Similar Sexual Offenses, 77 A.L.R.2d 841 (1961). But see *State v. McElroy*, 518 S.W.2d 459 (Mo.App.1975).

The defendant cites the general rule that evidence of a separate crime is admissible only if it has some legitimate tendency to prove guilt of the crime charged by establishing motive, intent, absence of mistake or accident, a common plan or the identity of the defendant. See *State v. Lee*, 486 S.W.2d 412 (Mo.1972). That is a recognized general rule. However, in cases of this nature "[i]t is well settled that in a prosecution for these offenses, evidence of prior sexual acts between the victim and the defendant are admissible even though they con-

stitute proof of the commission of separate crimes." *State v. Williams,* 654 S.W.2d 215, 217 (Mo.App.1983). Also see *State v. Graham,* 641 S.W.2d 102 (Mo. banc 1982); *State v. Simerly,* supra; *State v. Cole,* 581 S.W.2d 875 (Mo.App.1979). The defendant's second point is denied.

By his third point the defendant contends the evidence was insufficient because the testimony of the victims was inconsistent and contradictory and not corroborated. The defendant points to instances of confusion and contradiction in the testimony of the two children. He also refers to prior contradictory statements. He then cites *State v. Baldwin,* 571 S.W.2d 236 (Mo. banc 1978), in which the rule was stated, "[i]t is only in those cases where the evidence of the prosecutrix is of a contradictory nature or, when applied to the admitted facts in the case, her testimony is not convincing and leaves the mind of the court clouded with doubts, that she must be corroborated or a judgment cannot be sustained." *Id.* at p. 239. Also see *State v. Harris,* 620 S.W.2d 349 (Mo. banc 1981); *State v. Chamberlain,* 648 S.W.2d 238 (Mo.App.1983). The principle of *State v. Baldwin,* supra, "does not appertain, however, where the inconsistency or even contradiction bears on a proof not essential to the case." *State v. Salkil,* 659 S.W.2d 330, 333 (Mo.App.1983).

This court has with consideration of this point reviewed the various statements and testimony of the victims. In view of the age of the victims and their extensive interrogation, it is not unexpected that some inconsistencies and contradictions developed. By reason of the nature of the acts, the testimony of the victims shocks the senses. To that extent it is incredible. How-

ever, this is not the type of doubt contemplated by the stated rule.

It would serve no purpose to recount all of the evidence. It is sufficient that this court finds that in respect to each count there is no inconsistency or conflict in the victims' testimony concerning the essential proof of the offense or, where such inconsistency or conflict could be said to exist, there is corroboration. For example, whether the occasion for a party one victim attended the day of her rape was a graduation or other event was not an inconsistency or contradiction within the rule. The rape of one victim by the 14-year-old stepson of the defendant, at the instance of the defendant, in the presence of defendant's natural son, is corroborated by the testimony of that stepson. Further, the four charged rapes of the two victims are corroborated by their physical examinations. *State v. Laney*, 506 S.W.2d 452 (Mo.1974). The defendant's third point has no merit.

Count IV charged the defendant with rape by having intercourse with his adopted daughter to whom he was not married and who was less than 14 years of age in violation of § 566.030. As stated, the evidence to support this charge was that the defendant's 14-year-old stepson had intercourse with the victim at the instance of the defendant. This count was submitted to the jury under an instruction drawn from MAI-CR2d 2.12. Essentially, the instruction told the jury that if the stepson had intercourse with the victim to whom he was not married and who was less than 14 years of age the "offense of rape has occurred." The instruction then hypothesized that if the jury found, "with the purpose of promoting or furthering the commission of rape, the

defendant acted together with or aided [name of stepson] in committing that offense" the defendant was guilty under that count of rape. See MAI-CR2d 2.12.

By point four the defendant contends giving this instruction constituted reversible error. He argues that the stepson was only 14 years of age and could not be guilty of rape under § 566.030. The basic premise for this point is stated: "Appellant therefore contends that he cannot then be convicted of rape by aiding or encouraging another in the commission of an act which itself may not constitute rape."

Section 566.030, defining the crime of rape, places no restrictions upon the age of the male. For this reason the point does not present for consideration the argument that no one committed the physical acts proscribed by the statute. Further, for the resolution of this point it is not necessary to decide whether or not a male 14 years of age is guilty of the crime of rape by committing those physical acts. See *State v. Jackson,* 142 S.W.2d 45 (Mo. 1940). Compare §§ 211.031 and 211.071. For this point it may be assumed that even though a 14-year-old male committed the proscribed physical acts, by reason of his age, he is not subject to prosecution for or guilty of the crime. However, that assumption does not absolve the defendant. The decisive sections of the Criminal Code are § 562.041 and § 562.046. In part § 562.041 provides:

> 1. A person is criminally responsible for the conduct of another when
>
> . . . .
>
> (2) Either before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or

attempts to aid such other person in planning, committing or attempting to commit the offense.

The pertinent parts of § 562.046 read:

> It is no defense to any prosecution for an offense in which the criminal responsibility of the defendant is based upon the conduct of another that
>
> (1) Such other person has been acquitted or has not been convicted or has been convicted of some other offense or degree of offense or lacked criminal capacity or was unaware of the defendant's criminal purpose or is immune from prosecution or is not amenable to justice;
>
> . . . .

It is not necessary to resort to rules of construction or the citation of authorities to hold that by aiding the stepson in the conduct proscribed by § 566.030 the defendant was guilty of the crime of rape even though the stepson was not subject to prosecution for or was not guilty of that crime. That conclusion is apparent from the face of those sections.

The conclusion is made more apparent, in fact is mandated by the Comment to § 562.041 as contained in the 1973 Proposed Criminal Code. "[W]hen the General Assembly enacted . . . the new Missouri Act, it adopted the interpretation placed thereon in the commentary by the drafters of the Model Act." *State v. Anderson*, 515 S.W.2d 534, 539 (Mo. banc 1974). The applicable portion of that Comment to § 562.041 states:

> Subsection 1(2) is similar to Illinois Code Ch. 38, § 5-2(c) but unlike that section is designed to cover two different bases for liability for conduct

> of another. These two bases, causing *an innocent or irresponsible person to commit the conduct* and accessorial liability by aiding and abetting, are in separate sections in the other codes. (Emphasis added).
>
> . . . .
>
> Both these theories are here combined in a single section, which must be read in connection with § 562.046 (1) which precludes certain matters, including, the other person's lack of criminal capacity, unawareness of defendant's criminal purpose or immunity from prosecution, from being a defense to liability based on the conduct of another.

The defendant's basic premise for this point is false.

However, defendant also seeks reversal because the instruction contained an erroneous declaration of the law. He refers to the direction that if the stepson had intercourse with the adopted daughter "then you are instructed the offense of rape has occurred." Again, assuming the 14-year-old stepson did not commit the crime of rape, the quoted declaration standing alone is not correct.

This serves to emphasize Notes on Use 8 to MAI-CR2d 2.12. That Note on Use in part reads: "This format does NOT apply to situations where the defendant is being held responsible for the conduct of another person and that other person is not guilty of the offense. . . . In such cases, it may be necessary to modify MAI-CR2d 2.12." "Giving or failing to give an instruction or verdict form in violation of this Rule or any applicable Notes on Use shall constitute error, its prejudicial effect to be judicially determined." Rule 28.02(e); *State v.*

White, 622 S.W.2d 939 (Mo. banc 1981), *cert. denied,* 456 U.S. 963, 102 S.Ct. 2040, 72 L.Ed.2d 487 (1982).

As a prelude to that determination, it is appropriate to observe that the instruction also conditions the defendant's guilt upon a finding he acted together with or aided the stepson. When reviewed for error, the instruction must be considered as a whole. *State v. Holt,* 592 S.W.2d 759 (Mo. banc 1980); *State v. Ballard,* 657 S.W.2d 302 (Mo.App.1983). When so considered, when the jury found the defendant acted with or aided the stepson, the offense of rape *by the defendant* had occurred when the stepson had engaged in the conduct submitted in the instruction.

Deviation from an applicable MAI-CR2d instruction or Notes on Use is presumptively prejudicial unless the contrary is clearly demonstrated. *State v. White,* supra. "Prejudicial error will occur where the jury 'may have been adversely influenced by an erroneous instruction or by the lack of an instruction required by the statute.' " *State v. Rodgers,* 641 S.W.2d 83, 85 (Mo. banc 1982). The instruction in question, with clarity, squarely submitted every element necessary to establish the defendant was guilty of the offense submitted in Count IV. Compare *State v. Smashey,* 672 S.W.2d 154 (Mo.App. 1984). Under somewhat similar circumstances, it has been presumed the jury followed the instruction. *State v. Hunter,* 586 S.W.2d 345 (Mo. banc 1979). Also see *State v. Koetting,* 616 S.W.2d 822 (Mo. banc 1981). Nothing in the record suggests otherwise. *State v. Hunter,* supra. Particularly in the light of the evidence, considering the instruction as a whole, the use of the quoted phrase and failure to modify MAI-CR2d 2.12 was not

prejudicial. Compare *State v. White,* supra; *State v. Smashey,* supra; *State v. Ballard,* supra. However, failure to follow the applicable Notes on Use is not approved. In similar circumstances, MAI-CR2d 2.12 should be appropriately modified.

Count I charged the defendant with sexual abuse in the second degree by subjecting his stepdaughter, 12 years of age, to sexual contact. To support the charge there was evidence the defendant's natural son, 9 years of age, subjected that stepdaughter to such contact at the instance of the defendant. Count I was submitted to the jury by an instruction taken from MAI-CR2d 2.12. The instruction was substantially in the same form as the instruction under consideration by reason of defendant's fourth point.

By his last point defendant contends giving this instruction submitting Count I was reversible error. He supports that contention by the same arguments made under point four. For the reasons stated, those arguments are denied. The judgment is affirmed.

PREWITT, C.J., HOGAN, P.J., and CROW, J. concur.

ON MOTION FOR REHEARING
OR TRANSFER

PER CURIAM:

By his pro se post opinion motion the defendant seeks a rehearing or transfer because the court's opinion did not address issues allegedly raised by his pro se brief. It did not need to do so for the simple reason the pro se brief raised no issue worthy of observation.

His point that the issues dealt with in the opinion included issues of due process of law protected by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States is so vague it states nothing. His second point is that the trial impermissibly subjected him to double jeopardy. Each of the seven counts involved a separate and distinct violation of the law. It requires no citation of authority to make it obvious the seven convictions did not constitute double jeopardy. The motion for rehearing or transfer is denied.

All concur.

IN THE
CIRCUIT COURT OF GREENE COUNTY, MISSOURI
DIVISION IV

Case No. CR 583 807 FX 4

STATE OF MISSOURI,
Plaintiff,

vs.

KENNETH RAY PRESLEY,
Defendant.

TRANSCRIPT OF VOIR DIRE

Monday, April 2, 1984

Before the Honorable Max E. Bacon, Judge

APPEARANCES

For the Plaintiff, State of Missouri:

Ms. Nancy Applequist, Assistant Prosecutor
Ms. Marily Braun, Assistant Prosecutor
Greene County Courthouse
Springfield, Missouri

For the Defendant, Kenneth Ray Presley:

Mr. Steven Seigel
Attorney at Law
Plaza Towers
Springfield, Missouri

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PROCEEDINGS OF MONDAY APRIL 2, 1984

* * *

[12] THE COURT: Now, is there any of you that because of the nature of the case feel that you couldn't be fair and impartial?

(No one responds).

* * *

[17] THE COURT: Francis Cates?

JUROR CATES: I'm a native of Springfield. I've lived here except to go away to college and in the service, all my life. Married. Two children. One daughter thirteen, one boy nine. I'm president of Seminole Decor Centers, Incorporated.

THE COURT: Your wife works in that business, also?

JUROR CATES: Yes.

* * *

[45] MR. SEIGEL: Okay. I appreciate your honesty, sir.

Is there anyone else who perhaps feels the same way that they could not give my client a fair trial because of the nature of the charges against him?

(No one responds).

MR. SEIGEL: I take it by your silence everyone else, then, could give him a fair trial.

* * *

[48] MR. SEIGEL: Thank you. Mr. Cates?

JUROR CATES: Yes, I've been burglarized at my [49] home about seven years ago. We recovered the articles.

The businesses have been broken into several times and one armed robbery.

And, my daughter was exposed by an exhibitionist about three years ago that we reported.

MR. SEIGEL: Were you in your place of business when you had the armed robbery?

JUROR CATES: No.

MR. SEIGEL: Was it in the place of business?

JUROR CATES: Yes.

MR. SEIGEL: Anything about that or the burglary of seven years ago or your daughter's incident which would make you unable to sit in judgment fairly on my client, fairly today?

JUROR CATES: I don't, yes, I think I'd be a little partial to your client, or against your client.

MR. SEIGEL: You'd be partial to the State?

JUROR CATES: Right.

* * *

ORIGINAL

NO. 88-176

IN THE

SUPREME COURT OF THE UNITED STATED

October Term, 1988

STATE OF MISSOURI,

Petitioner,

vs.

KENNETH PRESLEY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

OFFICE OF THE PUBLIC DEFENDER
31ST JUDICIAL CIRCUIT

Margaret Elise Branyan
Assistant Public Defender

Anne Hall
Public Defender

333 Park Central E., Suite 323
Springfield, MO 65806
(417) 831-7722
Attorneys for Respondent

I N D E X

TABLE OF AUTHORITIES

Constitutional Provisions

Rules

STATEMENT OF THE CASE

Kenneth Presley, the Respondent, was charged in CR583-807FX4 in Greene County, Missouri with the offenses of second degree sexual abuse, child abuse, sexual abuse in the first degree, and four counts of rape. The victims were his stepdaughters Lisa and Melody Ince. He was found guilty at trial and thereafter sentenced according to the jury verdict. He received one year in the county jail for sexual abuse in the second degree, five years for abuse of a child, three years for sexual abuse in the first degree, and twelve years for each rape. The Court ran the sentences consecutively. Mr. Presley appealed the convictions and they were affirmed in State of Missouri v. Presley, 694 S.W.2d 867 (Mo. App. S.D. 1985).

Mr. Presley filed a Motion to Vacate, Set Aside or Correct a Conviction under Missouri Supreme Court Rule 27.26 (App. at A2). A hearing was held on that motion and the Honorable Don Bonacker, Division III of the Greene County, Missouri Circuit Court sustained Mr. Presley's motion finding he was denied effective assistance of counsel. (His ruling and all the subsequent decisions on appeal can be found in the appendix to Petitioner's Petition.)

The Missouri Court of Appeals, Southern District, en banc, affirmed Judge Bonacker's ruling. The State of Missouri asked for rehearing in the Court of Appeals and was denied. The State of Missouri asked the Missouri Supreme Court to take the case on transfer and the request was denied. The State of Missouri asks this Court to grant a writ of certiorari to hear this case.

Mr. Presley objects to this Court granting the State's petition for writ of certiorari.

ARGUMENT

Mr. Presley was charged with first degree sexual abuse, second degree sexual abuse, abuse of a child, and rape. During the voir dire Juror Frances Cates spoke up when the panel was asked if anyone had been a victim of a crime. He said that he had been burglarized at his home seven years before but the articles had been returned. He also said his businesses had been broken into several times. There had also been an armed robbery. Further, his daughter was "exposed by an exhibitionist" three years before (Petitioner's Appendix A69-70). When asked if the burglaries or his daughter's experience would make him unable to judge the defendant fairly, he said, "I think I'd be a little partial to your client, or against your client." He was asked: "You'd be partial to the State?" He adopted the attorney's statement by saying, "Right." (Petitioner's Appendix A70.)

Mr. Cates gave four different events which supported his reason why he would be partial to the Sate. It is typical of a juror speaking in front of a crowd of potential jurors, in front of a court, and in front of a defendant, to qualify his or her statements by softening them. He said he was a "little partial." What should be understood here was that the juror was a juror for the State. He could not give Mr. Presley a fair and impartial trial. Therefore even before the evidence began Mr. Presley had only eleven jurors listening to his case.

Petitioner argues the prejudice prong of the Strickland test (Srickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 80 L.Ed.2d 674 (1984)), in that prejudice to Mr. Presley was wrongly

presumed and the motion court and appellate court did not find actual prejudice. Petitioner asks for review because the appellate court did not follow Strickland and that the Court of Appeals' decision was contrary to the rulings of two federal courts and the decisions in several state courts. Petitioner is wrong.

A. Strickland v. Washington

This Court requires that in reversing for ineffective assistance of counsel a defendant must show that: a) counsel's performance was deficient, and b) this deficient performance prejudiced the defense. The Court of Appeals, Southern District, without specifically holding, found the trial counsel's performance to be deficient. It then found that Mr. Presley was prejudiced by the ineffective assistance of counsel in not striking Juror Cates.

The Missouri appellate court specifically found this situation was one envisioned by the Strickland court where prejudice is presumed (Petitioner's Appendix A15). The Strickland court mentioned several situations in which prejudice may be presumed: actual or constructive denial of the assistance of counsel; state interference with counsel's assistance; and counsel's conflict of interest. Strickland then refers to U.S. v. Cronic, 466 U.S. 660, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), which lists even more scenarios: complete denial of counsel; or when "counsel fails to subject the prosecution's case to meaningful adversarial testing," Cronic, 466 at 659. Further:

> Circumstances of that magnitude may be present on some occasions when although counsel is available

> to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Id. at 659-660. The Cronic court also adds that the accused must show how "specific errors of counsel undermined the reliability of the finding of guilty." Id. at 659, n.26.

The Strickland court offers examples of presumed prejudice. The Cronic court offers different examples of presumed prejudice. Obviously, neither decision intended its list to be exclusive. Nor did this Court intend to bind all inferior Courts to this Court's list of what can be presumed prejudicial and what cannot. Prejudice depends on the error being considered, the circumstances, the evidence, and the legal precedent of the respective jurisdictions.

Missouri has a strong tradition of ensuring a fair and impartial jury. The Presley appellate court repeated that a defendant has a constitutional right to twelve impartial jurors, not just eleven. (Petitioner's Appendix A14.) The Missouri Supreme Court has reiterated over and over:

> An accused must be afforded a full panel of qualified jurors before he is required to expend his peremptory challenges; denial by a trial court of a legitimate request by an accused to excuse for cause a partial or prejudiced venireperson constitutes reversible error.

State v. Stewart, 692 S.W.2d 295, 298 (Mo. banc 1985).

> This proposition rests now only in precedent but is rooted in the constitutionally guaranteed right of every accused to a "public" trial by an impartial jury," Mo. Const. Art. I, Sec. 18(a), and personifies a dedicated judicial effort to preserve inviolate this constitutionally guaranteed right in the broadest sense.

State v. Thompson, 541 S.W.2d 16, 17 (Mo. App. 1976).

Given the enormous solemnity in which Missouri courts regard the violation of Missouri (and federal) constitutional rights to an impartial jury, there is no wonder that the Court of Appeals decided that prejudice can be presumed.

Please note that a Missouri Court of Appeals decision allowing a reversal of a criminal conviction is a very unusual occurrence, especially in the Southern District. Petitioner is an alarmist when he predicts that the floodgates will open as a result of this opinion. All that the Court of Appeals said was this:

> The instant record shows that the jury contained one juror who was, by his own admission, biased. That was tantamount to a denial of the right to trial by jury. It is no answer to say that the other 11 jurors were free of bias and all of them agreed upon a verdict of guilty. "A constitutional jury means twelve men as though that number had been specifically named; and it follows that, when reduced to eleven, it ceased to be such a jury quite as effectively as though the number had been reduced to a single person." Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 256, 74 L.Ed. 854 (1930).
>
> The instant situation, this court holds, is an example of the type the Court envisioned by the language in Strickland: "in certain Sixth Amendment contexts, prejudice is presumed." There was here a denial of the right to trial by jury. This fits the Strickland language, at 104 S.Ct. 2067, that "prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost."

Presley v. State, slip opinion at 12 (emphasis added), (Petitioner's Appendix A14-15).

The Court's decision was limited to the facts of the case. To use Petitioner's language, "when boiled to its essence," the decision held this: when a juror announces he is biased toward the State, and all parties recognize that he has that bias, and there was absolutely no strategic reason for defense counsel to leave that juror on the jury, and when all the evidence shows that the juror was left on the jury by counsel's mistake, and when that mistake violates an accused's fundamental state and federal constitutional rights, then a court may find that an accused was denied the right to trial by jury.

That is all the decision says. There are no flood gates which will open as a result of this opinion.

The policy implications of this decision are minimal. In fact, so minimal that there is no reason for this Court to consider this case any further. Under Rule 17 of the U.S. Supreme Court, a writ of certiorari will be granted only when there are "special and important reasons therefor." This Court will grant a writ of certiorari when "a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court." Rule 17(1)(c).

This Court, in Strickland, has already decided the question of what constitutes ineffective assistance of counsel under the Sixth Amendment to the United States Constitution.

This Court will grant a writ of certiorari when the state court "has decided a federal question in a way in conflict with applicable decisions of this Court." Rule 17(1)(c). Again, the Court of Appeals referred constantly to Strickland for its authority and made its decision in conformity with Strickland. It did not show actual prejudice because Strickland allows prejudice to be presumed. That prejudice, according to Missouri law and federal constitutional law, could be and was presumed. Therefore, the decision in Presley by the Missouri Court of Appeals was in keeping with the Strickland decision.

OTHER JURISDICTIONS

An alternative consideration for granting certiorari is whether the state court decided a federal question in a way which conflicts with a decision of another state court of last resort or of a federal court of appeals. Rule 17(1)(b). Petitioner argues that the Court of Appeals' opinion is against the great weight of authority in state and federal courts which have used the Strickland standard. Petitioner lists these cases (Petitioner's Brief at 12). However, in reviewing all the cases cited by Petitioner, none of the cases cited are in conflict with the appellate court's decision, one is in agreement, none are factually similar, and some were even decided before Strickland was published and therefore didn't rely on any standard whatsoever. The following are the cases cited by Petitioner and discussion regarding their nonrelevancy:

U.S. v. Taylor, 832 F.2d 1187 (10th Cir. 1987). Factually dissimilar from Presley. Counsel used only eight or nine of his peremptory challenges and waived the rest. There was no allegation of inability to be impartial by any juror. There was no discussion of presumed versus actual prejudice.

Edgemon v. Lockhart, 768 F.2d 252 (8th Cir. 1985), cert. denied, ____ U.S. _____, 106 S.Ct. 1468 (1986). Defense counsel didn't strike a certain juror because the juror was an acquaintance of defense counsel and, even though the juror knew his cousin would testify, he knew he could be impartial. It was not a mistake by defense counsel to keep the juror. It was his tactical decision. Unlike Presley where the juror was left on by mistake.

Mason v. State, 789 Ark. 299, 712 S.W.2d 275 (Ark. 1986). The Supreme Court of Arkansas reversed a conviction after determining that the accused was denied effective assistance of counsel when, among other things, it found under the Strickland test that the accused was prejudiced by trial counsel not giving the accused a jury list. If he had been present during voir dire he could have told trial counsel that two of the jurors were partial toward the state, one because she heard rumors about the case, and the other because she was a victim of a burglary. Trial counsel did not ask the panel during voir dire about being the victim of a crime. The Arkansas Supreme Court did not even discuss proof of actual prejudice; they said they did not

think of any trial strategy which would have permitted these attorney errors; and they presumed prejudice. This opinion is in conformity with the Missouri Court of Appeals opinion.

Trenor v. State, 252 Ga. 264, 313 S.E.2d 482 (Ga. 1984). This case was decided before Strickland. The Court used a different standard than that used in Strickland. The Court found no ineffective assistance of counsel when the trial lawyer did not ask the court to wake up a juror during closing argument.

People v. Collins, 106 Ill.2d 237, 478 N.E.2d 267 (Ill. 1985). The court found that the attorney's reason for keeping a juror who said she could be impartial was reasonable. The attorney's action therefore didn't even meet the first prong of the Strickland test.

Turner v. State, 508 N.E.2d 541 (Ind. 1987). The juror whom the accused said should have been struck had a DWI conviction but never said he would be partial to the state. No Strickland discussion at all.

State v. Nebinger, 412 N.W.2d 180 (Iowa Ct. App. 1987). The facts are completely different here from that in Mr. Presley's case and there was no discussion of prejudice.

People v. Robinson, 154 Mich. App. 92, 397 N.W.2d 229 (Mich. Ct. App. 1986). All jurors said they could be impartial. This case is different from Mr. Presley's and has no relevant discussion of what a showing of prejudice must be.

State v. Price, 104 N.M. 703, 726 P.2d 857 (N.M. Ct. App. 1986). Ineffective assistance of counsel was not found because, unlike Mr. Presley's case, trial counsel did everything he could to correct the error and protect the accused's rights.

Perkins v. State, 695 P.2d 1364 (Okla. Crim. App. 1985). Not on point. The juror misunderstood counsel's question. There is no discussion of how to demonstrate prejudice or of Strickland itself.

Commonwealth v. Mancini, 340 Pa. Super. 492, 490 A.2d 1377 (Pa. Super. Ct. 1985). The Court said the accused agreed with defense counsel's decision not to strike a juror. There was no discussion of prejudice and the court used different standards than Strickland's in determining ineffective assistance of counsel.

Parker v. State, 693 S.W.2d 640 (Tex. Crim. App. 1985). A juror thought that the accused may be hiding something if he didn't testify. Defense counsel did not strike her. The appellate court suggested that defense counsel could have had a strategic reason for not striking that juror. The Court, however, was obviously agonized by the fact that there was no evidentiary hearing to determine what counsel's reasons were for not striking the venirewoman. Twice in its opinion the court asked for evidentiary hearings so it did not have to decide these issues in the dark. Unlike this decision, a hearing was held in Presley and the trial attorney had no strategic reason for not striking Juror Cates.

Finally, in Gordon v. State, 469 So.2d 795 (Fla. Ct. App. 1985) the Court wrote:

> At the time of jury selection, one juror stated she had heard of this particular case, had discussed it with friends and was biased. She further indicated that she had a prejudice against the defense counsel which would affect her decision. The trial judge offered to remove the juror for cause if requested. Defense counsel permitted her to sit as a juror.

Id. at 797.

The conviction in Gordon was reversed for several attorney errors. A discussion of actual versus presumed prejudice was done given by the Gordon court. That very fact demonstrates the correctness of the Court of Appeals decision in Presley. The gross violation of an accused's constitutional right to trial by a fair and impartial jury needs no discussion. It is presumed prejudicial, by the Gordon court, by the Mason court, and by the Presley court.

As can be seen, the Court of Appeals' opinion is not in conflict with any opinion or with any jurisdiction in spite of what Petitioner alleges. Indeed it can be read in conformity with all the above cited decisions and is, indeed, supported by them. Therefore, under Rule 17(a)(b) of this Court, there is no conflict to be resolved.

C. Prejudice

Finally, this Court is not being asked to find that prejudice did actually exist. That is not the question before this Court. Petitioner raises the issue anyway.

Juror Cates did not answer when the panel was asked if everyone could be fair and impartial considering the "nature

of this case" (Petitioner's Appendix A69) (emphasis added). This was a case involving sexual abuse and rape of stepdaughters. Clearly the court and attorneys were asking a specific question as to whether a case involving the sexual abuse of children would cause the panel not to be fair and impartial. But that was not Cates' problem. It was because of the prior burglaries and the exposure to his daughter that he could not be impartial. Cates did all that he could do to show the Court he could not be fair by announcing his feelings at the appropriate time. Instructing a juror to be fair and impartial will not cure his or her prejudice. If that were true then there would be no reason for voir dire at all.

Secondly, Petitioner suggests that the evidence was strong enough to have convicted Mr. Presley without Juror Cates. Petitioner notes that Mr. Presley did not challenge the weight of the evidence against him in his post-conviction hearing. Petitioner fails to note that Missouri's post-conviction relief procedure, under Rule 27.26 (Appendix at A2), does not allow for challenging the trial evidence and, in fact, is very narrow in scope.

The primary evidence by the state at trial was given by the two stepdaughters. There was no medical evidence confirming rape. There was no confession by Mr. Presley. Mr. Presley testified at trial and asserted his innocence. The defense called fourteen witnesses other than Mr. Presley. Juries have, under similar evidence in similar

cases, acquitted the accused. They could have done so in this case. Because they did not acquit does not mean that any jury anywhere would have found him guilty. It's wrong to say that just because the weight of the evidence is against the accused he is not entitled to a fair and impartial jury. Further, the weight of the evidence could not be as strong as Petitioner alleges because both Ince girls have recanted their story. And even further, the jury assessed minimal sentences for each of the charges. Mr. Presley could have gotten life on each rape charge instead of 12 years, 5 years for sexual abuse in the first degree instead of 3 years, and 7 years for abuse of a child instead of 5 years.

The "right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 1449 n.14, 25 L.Ed.2d 763 (1970). The right to a fair and impartial jury is inviolate under the Sixth Amendment to the United States Constitution and Article 1, Section 18(a) of the Missouri Constitution. The findings of fact and conclusions of law of the trial court are guaranteed the presumption of correctness. State v. Harvey, 692 S.W.2d 290, 293 (Mo. banc 1985). The trial court and the appellate court both correctly decided this case under federal and state law and federal and state decisions.

CONCLUSION

In view of the foregoing, Mr. Presley, Respondent, respectfully requests that Petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) when a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

MISSOURI SUPREME COURT RULE 27.26

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this state or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside, or correct the same. The following procedure shall be applicable to motions filed pursuant to this Rule:

(a) Nature of Remedy. This Rule is intended to provide the exclusive procedure which shall be followed when a prisoner in custody seeks relief on the basis of any of the attacks on a sentence enumerated above. The motion seeking such relief shall be filed in the court where the sentence was imposed. This Rule does not suspend the rights available by habeas corpus but rather prescribes the procedure to be followed in seeking the enforcement of those rights. It includes all relief heretofore available in any court by habeas corpus when used for the purpose of seeking to vacate, set aside or correct a sentence, plus relief not available by habeas corpus. A motion filed hereunder is an independent civil action which should be separately docketed. The action which should be separately docketed. The procedure before the trial court and on appeal is governed by the Rules of Civil Procedure insofar as applicable. No cost deposit shall be required.

(b) When Remedy May be Invoked.

(1) The provisions of this Rule may be invoked only by one in custody claiming the right to have a sentence vacated, set aside or corrected.

(2) A motion to vacate, set aside, or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which an appeal may be perfected.

(3) A proceeding under this Rule ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal.

(c) For and Sufficiency of Motion. A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto. The motion shall include every ground known to the prisoner for vacating, setting aside, or correcting his conviction and sentence. The prisoner shall

verify the correctness of the motion, including the fact that he has recited all claims known to him.

(d) **Successive Motions.** The sentencing court shall not entertain a second or successive motion for relief on behalf of the prisoner where the ground presented in the subsequent application was raised and determined adversely to the applicant on the prior application or where the ground presented is new but could have been raised in the prior motion pursuant to the provisions of subsection (c) of this Rule. The burden shall be on the prisoner to establish that any new ground raised in a second motion could not have been raised by him in the prior motion.

(e) **Hearing.** As soon as a motion hereunder is received by the circuit clerk, he shall notify the prosecuting attorney and transmit a copy thereof to him. If appointment of counsel is required under (h) of this Rule, such counsel shall be appointed immediately and a copy of the motion transmitted to him. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing thereon shall be held. "Prompt" means as soon as reasonably possible considering other urgent business of the court. This hearing shall be an evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of records of the court, that issue shall be determined in the evidentiary hearing. All proceedings on the motion shall be recorded by the official court reporter.

(f) **Burden of Proof.** The prisoner has the burden of establishing his grounds for relief by a preponderance of the evidence.

(g) **Presence of Prisoner.** The prisoner shall be produced at any evidentiary hearing on a motion attacking a sentence where there are substantial issues of fact.

(h) **Right to Counsel.** When an indigent prisoner files a pro se motion, the court shall immediately appoint counsel to represent the prisoner. Counsel shall be given a reasonable time to confer with the prisoner and to amend the motions filed hereunder if desired. Counsel shall have the duty to ascertain from the prisoner the facts supporting the grounds asserted in the motion and if those facts are not sufficiently stated in the motion, counsel shall file an amended motion. Counsel also shall ascertain from the prisoner whether he has included all grounds known to him as a basis for attacking the judgment and sentence and, if not, shall file an amended motion which also sufficiently alleges any additional grounds and the facts in support thereof. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel to represent the indigent defendant.

(i) Judgment. The court shall make findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgement was rendered without jurisdiction, or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentences as may appear appropriate.

(j) Appeal. An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the prisoner or by the state. An appeal may be taken from the order entered on the motion as in a civil case as authorized by Section 512.020, RSMo. Appellate review shall be limited to a determination of whether the findings, conclusions, and judgment of the trial court are clearly erroneous.

(k) Costs. If the trial court finds that a prisoner desiring to appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost the transcript of such proceeding for appellate review. The trial court, when the appeal is taken, shall order the official court reporter to prepare the transcript promptly. If the trial court finds adversely to a prisoner on the issue of indigency, it shall certify and transmit to the appellate court a transcript of the evidence on that issue only so as to permit review of that issue by the appellate court.

(l) Counsel on Appeal. If a prisoner desires to appeal and contends he is without means to employ counsel to perfect the appeal, the trial court, if satisfied that the prisoner is an indigent person, shall appoint competent counsel to conduct such appeal. Such counsel, may, in the discretion of the court, be the same counsel who represented the prisoner in the trial court on said motion. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.